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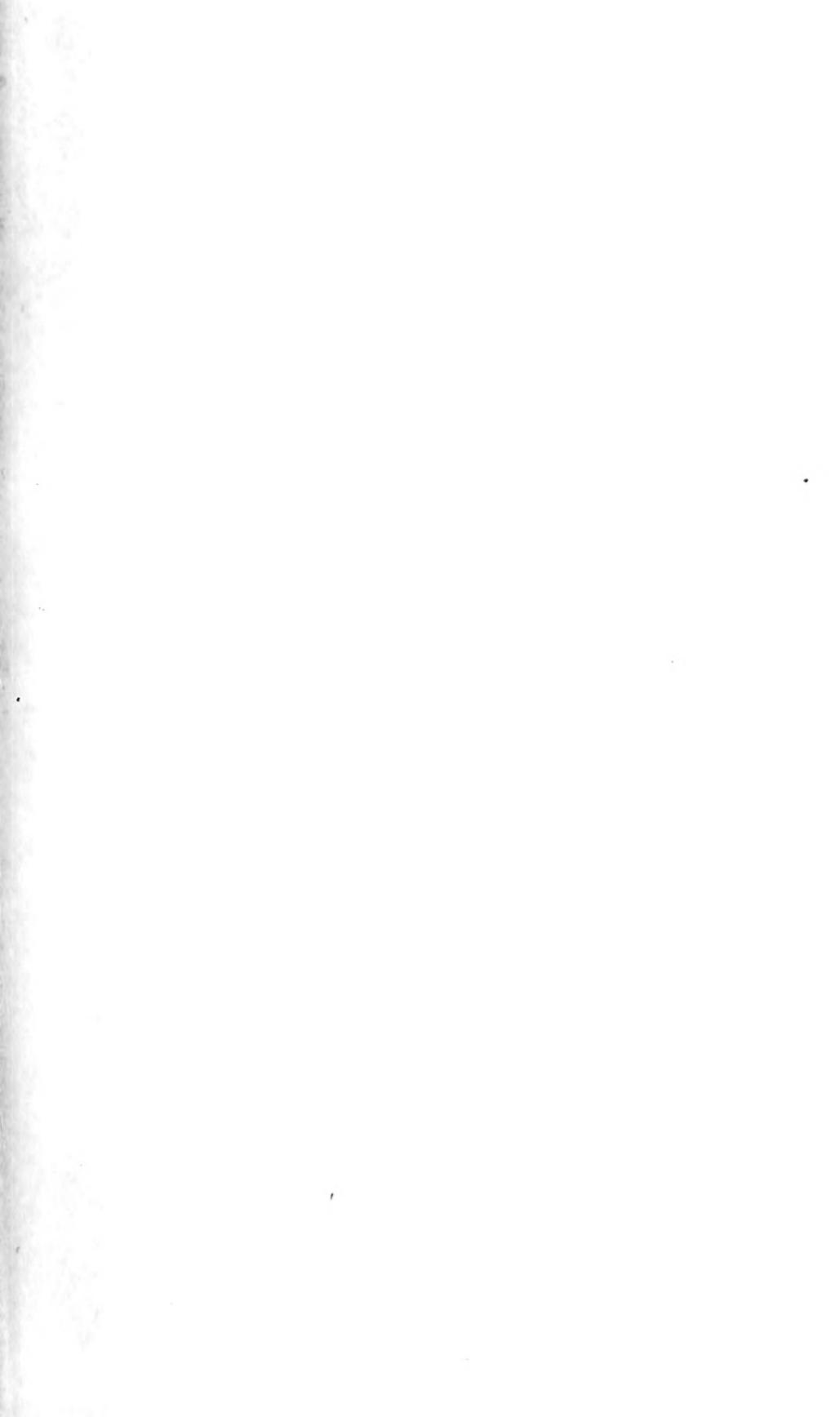
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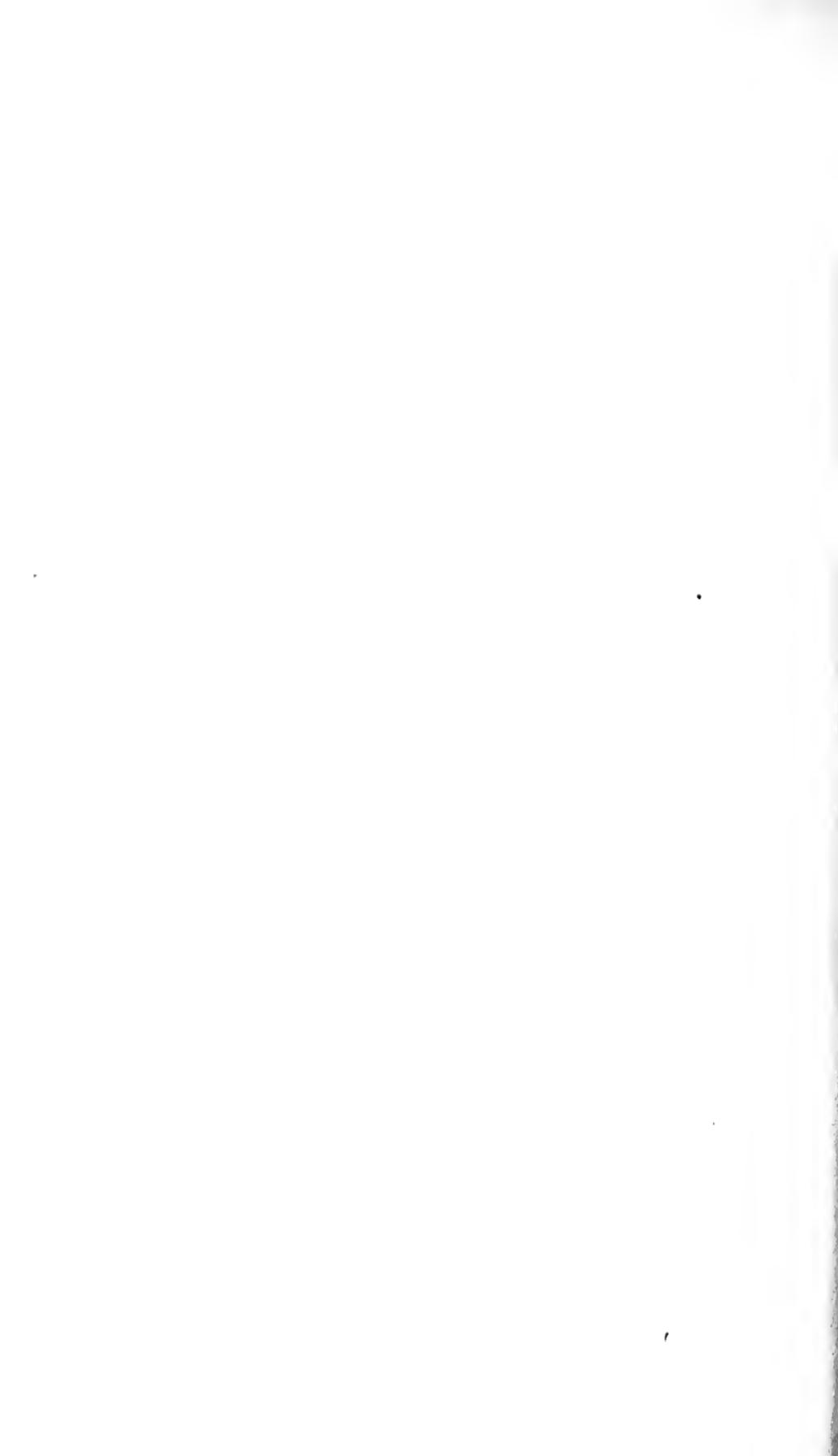
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2586  
No. 12275

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United States  
Court of Appeals

For the Ninth Circuit.

—  
F. W. CARLSTROM and MRS. GEORGE  
(RETA) TAITT, Individually and as Co-  
partners, Doing Business Under the Firm  
Name and Style of Associated Packing Com-  
pany,

Appellants,

vs.

AGRICULTURAL INSURANCE COMPANY,  
FEDERAL UNION INSURANCE COM-  
PANY, GLOBE AND RUTGERS FIRE IN-  
SURANCE COMPANY, THE HOMESTEAD  
FIRE INSURANCE COMPANY and NEW  
HAMPSHIRE FIRE INSURANCE COM-  
PANY,

Appellees.

—  
Transcript of Record

—  
Upon Appeal from the United States District Court  
for the Northern District of California,  
Southern Division



No. 12275

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

#### AGREED STATEMENT OF FACTS

On or about August 1, 1945, the above-named insurance company defendants issued to plaintiffs their respective policies of insurance under provi-

sional reporting form (monthly average), covering

“merchandise of every description (except as hereinafter excluded) consisting principally of Lumber \* \* \*”

for the provisional amounts of \$8,500 each, being 20% of the total contributing insurance. The limit of liability for all contributing insurance shown under Item No. 1 of each said policy was \$70,000 at the described location, “west side of East 2nd Street, between ‘B’ and ‘D’ Streets, Benicia, California,” and under Item No. 3, \$15,000 at “Benicia Arsenal Grounds, Benicia, California” and under Item No. 10, \$2,500 “at any other location within the above-named geographical limits where the insured may have property as above described \* \* \*.” Each said policy contained, among others, the following standard provisions prescribed by the laws of the State of California (California Insurance Code, Sec. 2071), viz:

“ 85 Duty of insured in case of loss. \* \* \*

89 Within sixty days after the commencement of the fire the insured shall render to the company at its main office in

90 California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:—

91 (a) his knowledge and belief as to the origin of the fire; (b) the interest of the in-

sured and of all others in the property; (c) the

92 cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other

93 insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all

94 other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or prop-

95 erties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property

96 since the issuance of this policy; \* \* \*

\* \* \* \*

109 Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of the

110 loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified

111 amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit

112 that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total

113 disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the

114 company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

115 If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such

116 notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a

117 disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such

118 demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the

119 two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

\* \* \* \*

125 If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and

126 completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced

127 by the failure to make an appraisalment, and  
 may prove the amount of his loss in an ac-  
 tion brought without such appraisalment.

\* \* \* \*

135 Apportionment of loss. This company shall  
 not be liable under this policy for a greater  
 proportion of any loss

136 on the described property, or for loss by, and  
 expenses of, removal from the premises en-  
 dangered by fire, than the amount hereby

137 insured bears to the entire insurance cov-  
 ering such property whether valid or not, or  
 by solvent or insolvent insurers.

138 Loss when payable. A loss hereunder shall  
 be payable in thirty days after the amount  
 thereof has been ascer-

139 tained either by agreement or by appraise-  
 ment; but if such ascertainment is not had or  
 made within sixty days after the receipt

140 by the company of the preliminary proof of  
 loss, then the loss shall be payable in ninety  
 days after such receipt."

A fire occurred on or about October 6, 1945, which destroyed all of the property described in said policies except 1% thereof.

On the 4th day of December, 1945, within the time prescribed by said standard form California fire insurance policy, plaintiffs furnished the defendant insurance companies and each of them with

proofs of the loss under said policies, and performed all the conditions of such standard form policy on their part to be performed.

The property insured and above described, together with two machines, had been purchased from the Government at Benicia Arsenal, on June 26, 1945, for Sixteen Thousand Dollars (\$16,000), under an invoice (Plaintiff's Exhibit 17) describing it as

“Crate, Fabricated Wood, Ponderosa and Sugar Pine. For full description of property, see attached Form No. 1076.”

Form 1076 contains the following description:

“Quantities Are Approximate

Troughs, wood, Ponderosa and Sugar Pine grades ranging from #1 to #3, average #2. Dressed on 2 sides and worked. Air dried. Water stained. Mfd. by Columbia Steel Mills, Minotto, N. Y.; stacked in 9 piles. Troughs of various lengths and widths ranging from 26 to 43 in. long, 1½ to 3 in. bottoms and 2½ in. sides ¾ in. thick. Nails spaced about 8 in. apart. Some indication of discoloration and decay due to open storage.

Quantity—4,470,408 brd. ft.

\* \* \* \*

#### Description and Location

Approximately 25% of troughs in bundles of 8 to 12 troughs each. Balance loose and mixed in piles along with some wood slats ¾ in. thick, 2 in. wide and 26 to 43 in. long.

Pile # 1— 851,220 brd. ft.

Pile # 2— 76,068 brd. ft.

Pile # 3—1,031,580 brd. ft.

Pile # 4— 871,740 brd. ft.

Pile # 5— 560,880 brd. ft.

Pile # 6— 423,360 brd. ft.

Pile # 7— 350,100 brd. ft.

Pile # 8— 198,180 brd. ft.

Pile # 9— 107,280 brd. ft.

The verified proof of loss served on each of the defendant insurance companies on December 4, 1945, represented plaintiffs' claim as

“Approximately 5,000,000 board feet. Troughs were Ponderosa and Sugar Pine. Grades predominately #1 Grade. Dressed on two sides and worked. Air Dried, Water stained to prevent deterioration. Manufactured by Columbia Steel Mills, Winneto, New York. Ranging from 26 to 43 inches long.  $\frac{1}{3}$  to 3-inch bottoms, and  $2\frac{1}{2}$ -inch sides;  $\frac{3}{4}$  inches thick; nails spaced about 5 inches apart. Valued at \$125,000.”

Defendant insurance companies disagreed as to the amount of loss claimed, but admitted a loss of \$14,320.

Suit was instituted by plaintiffs on June 24, 1946, in the State court, and was removed to the United States District Court on July 3, 1946. In the veri-

fied complaint, consisting of four counts, it was alleged:

“that said property consisted of 5,000,000 board feet of lumber; that the value of said lumber at all of said times was \$125,000.”

The first cause of action alleged the issuance of the policies described therein, annexed thereto and made a part thereof, by the defendant insurance companies, all of which contained the standard provisions prescribed by the laws of the State of California, and particularly those hereinbefore set forth. Said first count was based upon an alleged oral contract between said defendant insurance companies for insurance coverage on said property in the amount of \$25,000 in each of said defendant companies. Recovery in the sum of \$24,750 was sought from each company, or a total of \$123,750.

The second cause of action alleged an oral contract of insurance for \$125,000 entered into by defendant Agricultural Insurance Company, by and through its agent, the defendant George A. Levy. A judgment under this count was sought in the sum of \$123,750.

The third cause of action alleged insurance coverage of \$87,500 evidenced by said policies of insurance attached to and made a part of the complaint, and sought judgment against each of the defendant insurance companies in the sum of \$17,325, or a total of \$86,625.

The fourth cause of action was for \$37,125 damages against the defendant Levy as the broker of

plaintiffs, based upon a contract between said Levy and plaintiffs, by which he allegedly undertook and agreed to procure the additional amount of coverage in said sum of \$37,500.

The case was tried January 6th to 10th, inclusive, 1948, and was to be submitted upon the written arguments of counsel. At the conclusion of the trial in January, 1948, the court ordered the fourth count, as to the defendant Levy, dismissed and announced that the evidence was insufficient to charge the defendant insurance companies upon the alleged oral contract set forth in Count 1, and that the evidence was also insufficient to charge the defendant Agricultural Insurance Company under Count 2. The court further announced that the total amount of insurance covering the property insured on the date of the fire at the location described in the policies was \$70,000 and not \$87,500. The court then announced that the sole question for determination was: "What was the market value, on October 6, 1945, of the lumber and shell troughs destroyed by the fire."

In plaintiffs' opening brief filed February 4, 1948, it was contended that the Government invoices showed the quantity of lumber to be 5,078,950 board feet and that actual measurements according to the testimony of witnesses showed 5,800,000 board feet. In a "Summary of Minimum Valuation (Market Value) Testified by Witnesses on Behalf of Plaintiffs of Shell Crate or Ammunition Case Lumber Material" furnished to the Court at

the conclusion of the trial, the following valuations were submitted:

Brydeson E. Cannon

Minimum valuation for shell troughs	
\$10 per thousand times 5,000,000 board	
feet equals.....	\$ 50,000.00
Minimum valuation for slats \$75 per	
thousand times 800,000 board feet	
equals .....	60,00.000
	<hr/>
Total .....	\$110,000.00

Claude J. Falconer

Minimum valuation for shell troughs	
\$20 per thousand times 5,800,000 board	
feet equals.....	\$116,000.00

C. W. Carlstrom

Minimum valuation \$30 per thousand	
for shell troughs times 5,000,000 board	
feet equals.....	\$150,000.00
\$90 per thousand for clear slats times	
800,000 board feet equals.....	72,000.00
	<hr/>
Total .....	\$220,000.00

In plaintiffs' closing brief filed February 11, 1948, plaintiffs contended that the valuation given by the witness C. W. Carlstrom was \$30 per thousand, representing a total of \$132,771.12. This witness testified to an average valuation for each size (length) of troughs of \$35 per thousand (p. 140, line 20) and \$90 to \$110 per thousand for the slats (p. 137, line 9). It was also contended, as testified

to by the witness Benson, that he made a tentative offer of \$22.50, which represented a total valuation of \$114,276.37. This offer was conditioned upon plaintiffs awaiting payment for the material until Mr. Benson had sold the material or articles manufactured therefrom. Plaintiff Mrs. Taitt corroborated the testimony of this offer.

In said closing brief counsel for plaintiffs admitted error in their previous argument brief in contending that the total quantity shown by the invoice of the War Assets Administration was 5,078,950 and stated that the said invoice showed a total of 4,470,408 board feet only. It was also therein stated:

“In the face of the record, we feel impelled to accept as accurate the total quantities shown in the itemization by pile on the ‘Bid and Contract Form Surplus Sales Continuation Sheet.’

Deducting one per cent or 44,704 from 4,470,408 leaves 4,425,704 feet net, which was destroyed by the fire.

\* \* \* \*

We apologize to the Court for what now appears to us an erroneous contention on our part as to the quantity of lumber contained in the shell troughs and slats.

\* \* \* \*

Before leaving this subject of quantity, we wish to make clear that we do not recede in the least from the position that credible, dependable, expert testimony was given at the trial to the effect that by measurement the actual

amount of shell troughs and lumber in board feet was approximately 5,570,000 \* \* \*.”

In said closing brief plaintiffs claimed that of the 4,425,704 board feet shown by said invoice, 690,142 board feet represented slats in the total quantity of 1,650,089, and that such calculations were predicated upon their interpretation of the testimony of defendant insurance companies' witness A. L. Miller, foreman of the carpenter shop at Benicia Arsenal, that on the larger sized crates there were three slats to three troughs.

According to the testimony of said Miller, an attempt was made to break up the troughs by hand and by various machines built for that purpose. Said Miller testified, based on figures on the cost of breaking up troughs without pulling the nails, by use of the machines, to a cost of \$38.33 per thousand. Witnesses Rose and Cohn testified to a cost of \$67.17 per thousand for breaking up the troughs by hand, by carpenters employed by them.

The witnesses Taitt, Forbes and Cleu testified in effect that the trough could be separated, by use of the machines delivered to the plaintiffs, at a cost of from \$3.50 to \$7.50 per thousand board feet.

Said witness Cohn testified that the market price of the type of lumber exhibited, in commercial sizes of 8 ft. to 26 ft. lengths and 1 ft. x 6 in. to 1 ft. x 8 in., based on actual purchases, was \$52.75 per thousand for No. 2 common. The witness Cohn admitted on cross-examination that he had been used as a witness by fire insurance companies in actions involving fire losses on numerous occasions—

perhaps twenty times. The witness Rose likewise testified that he had been a witness on behalf of insurance companies in similar cases numerous times. He also testified that he had no experience in buying and selling used lumber. Cohn testified that the lumber had no value. Otto Bernhard Gall testified that the material was not feasible as lumber, had no value for his purposes. On cross-examination he admitted that the slats were worth 6 cts. each.

On March 29th the court made an Order vacating the submission of the case and ordered

“that this case be placed on the calendar for May 21, 1948, for the purpose of taking further testimony.”

The further trial proceeded on May 27th and 28th, and again on October 27th and 28th and on November 5th, at which time the taking of testimony was concluded, upon reopening the case for further trial, evidence was introduced on behalf of plaintiffs as to the quantity of the troughs and slats, also as to the efficiency of the automatic separator and nail puller.

Plaintiffs offered to prove that the appraised value of the lumber material sold to plaintiffs by the Government (as evidenced by document contained in the records of the War Assets Administration—Plaintiffs' Exhibit No. 29 for identification) was \$55 per thousand or a total of \$262,607.40.

A witness (G. R. Tully), was called on behalf

of plaintiffs, who testified that he had been in the wholesale lumber business for thirty years, sales manager for seven years, and was a qualified inspector of lumber for forty years, buying and selling lumber; that he was employed by Hallinan Mackin Lumber Company of San Francisco; that the wooden slat (Plaintiffs' Exhibit 16) was No. 1 clear. This witness was limited in his testimony to slats and was not permitted to testify to a valuation of the troughs. An offer was made that he would testify that the slats and troughs had a market value of \$25 per thousand at the time of the fire.

After oral argument on November 12, 1948, the case was submitted and on February 18, 1948, the court made the following Order:

#### “ORDER

After a protracted trial, necessitated by the reopening of the case in order to adduce additional testimony with respect to the quantity of slats involved in plaintiffs' suit against defendants on insurance policies, and after careful study, review of the record and detailed brief prepared by both sides, the court is prepared to make certain findings. A pre-occupation with current trial work prevents a more extensive discussion of the facts; the following is a synopsis of the more controverted aspects of the case:

With respect to the troughs, the court finds that the quantity destroyed by the fire was 3,830,704. This number is derived by taking the quantity shown

on the government invoice as representing the total lumber (troughs and slats), in plaintiffs' possession, subtracting therefrom 500,000 board feet which were used in the box factory, deducting 1% of the total which remained after the fire and subtracting the further sum of 100,000 board feet representing 200,000 slats destroyed by fire and for which allowance is made elsewhere in this order.

Testimony as to value was so conflicting as to make the court's task of ascertaining actual worth of the troughs all but impossible. The testimony offered by plaintiffs in connection with the possible commercial advantages and purposes to which the lumber contained in the troughs might be suited was not convincing and no predicate was established for a value save and except a bare minimum value for the troughs as is. The realities of the situation are ever present and notwithstanding the hopeful expectations of plaintiffs as to the possible uses to which the lumber might have been put, the fact remains that there was no credible testimony indicating an immediate commercial use for the lumber contained in the troughs.

The court finds that the machine processes for disassembling the troughs proved to be ineffectual up to the time of the fire. The court also finds that the technique of stripping the troughs by hand or sawing off the nailed sections of the troughs and breaking them down in this manner was so costly as to make the operation economically unsound.

Accordingly, the court finds that the reasonable market value of the troughs at the site of the fire was \$5.00 per thousand board feet.

Applying the court's determination as to value of the troughs "as is" to the quantity of board feet destroyed by the fire (excluding slats) the court finds that the troughs had a value of \$19,153.52.

With respect to the slats involved in the litigation: The court once more is compelled to express concern at the great variation in figures disclosed by the testimony of the witnesses and as revealed by the documents submitted in evidence. From these variations the court has been forced to choose an amount certain, which it deems to be the most accurate estimate of the quantity of slats on hand and destroyed by the fire. Admittedly, this amount must be an estimate, for the record discloses that unknown numbers of slats were removed by Italian prisoners of war and were not accounted for and unknown quantities were diverted while en route to Benicia Arsenal. Accordingly, the court finds that there were 200,000 slats in the pile of lumber which was destroyed by the fire.

Although there are variations in the estimated value of the slats, the range is not so great as it is for the troughs. In view of the testimony of defendants' witness Frazier that the slats were worth 6c per slat the court is prepared to find that this figure represents their value.

Applying a value of 6c per slat to the quantity found by the court to have been destroyed by fire, we reach a figure of \$12,000 for the slats. This figure, added to the value of the troughs as set forth above, gives a total loss to plaintiffs of \$31,153.52 caused by the fire, and the court so finds.

At the conclusion of the trial defendants withdrew their original offer of \$14,360 which had been tendered to plaintiffs at the outset of the trial and charged plaintiffs with fraud. Although the record is replete with inconsistencies and backtrackings on the part of several of plaintiffs' witnesses, the court is not prepared to hold that such inconsistencies attain the stature of fraud.

Based on the entire record, the court renders judgment in favor of plaintiffs and against defendants in the amount of \$31,153.52, together with their costs. Plaintiffs to prepare Findings of Fact and Conclusions of Law in accordance with this Order.

Dated: February 18, 1949."

Thereafter proposed Findings of Fact and Conclusions of Law and proposed form of Judgment were submitted by plaintiffs' counsel. Concurrently therewith plaintiffs submitted a written Memorandum in support of findings that plaintiffs were entitled to interest on the amount found due by the court from and after the 4th day of March, 1946, as provided by the terms of the policies. Defendant insurance companies and defendant Levy filed written objections to the proposed Findings of Fact and Conclusions of Law and of form of Judgment, and the defendant insurance companies filed concurrently therewith a Memorandum in Opposition to the Allowance of Interest on said amounts found due by the court. Thereafter, to wit, on March 25, 1949, the court made the following Order with reference to the allowance of interest:

“Order With Respect to Interest Allowance

The briefs on file have been considered.

The Court is not persuaded to depart from the rule of this Circuit in *National Union Fire Insurance Co. v. California C. Credit Corp.*, 76 F. (2d) 279.

The factual background does not permit or justify the application of *Koyer v. Detroit F. & M. Ins. Co.*, 9 Cal. (2d) 336, upon which plaintiff relies. Section 3287 of the California Civil Code must be read and interpreted in the light of the whole record before this Court.

Accordingly, the *Koyer* case is not controlling in the situation presented in the case at bar.

Suffice to say that it remained for this Court to ascertain the amount of liability from the evidence introduced at the trial.

The proposed findings of fact and conclusions of law must, therefore, be modified on the question of allowance of interest.

Dated: March 25, 1949.”

In accordance with the directions of the court contained in said Order Disallowing Interest, plaintiffs, in obedience thereto, caused to be prepared and filed with the court revised or amended Findings and Judgment, which were entered March 31, 1949.

Thereafter, to wit, on April 7, 1949, plaintiffs filed Notice of Motion to Alter or Amend the Findings of Fact and Judgment entered and on the same day also filed a notice of motion to Withdraw the moneys paid into court by defendant insurance companies on April 1, 1949. Said motions came on for

hearing on the 11th day of April, 1949, at which time an Order was made reading as follows:

“Order Amending Findings of Fact, Conclusions of Law, and Judgment -

“The Notice of Motion to Alter or Amend the Judgment herein having been served within ten days after the entry of judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and said motion having come on regularly for hearing this 11th day of April, 1949, Neil Cunningham appearing for the plaintiffs and H. A. Thornton appearing for the defendant insurance companies, and the Court having considered the matter,

It Is Hereby Ordered that the Findings of Fact and Conclusions of Law heretofore made and entered herein be and they are hereby amended as follows:

There shall be added to Finding X, page 7, at line 4, the following:

‘13. That plaintiffs are not entitled to interest on said sums due under said policies above listed.’

It Is Hereby Further Ordered that the Conclusions of Law be and the same are hereby amended in the following particular:

There shall be added thereto Paragraph 8-a on page 9 between lines 16 and 17, reading as follows:

‘8-a. That plaintiffs are not entitled to interest on each said amount from the 4th day of March, 1946.’

It Is Further Ordered that the Judgment heretofore entered herein be and the same is hereby amended in the following particular: ‘

On page 2, between lines 24 and 25 there shall be added the following paragraph:

‘It Is Further Ordered, Adjudged and Decreed that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, and that plaintiffs take nothing as and for interest on said amounts.’

Done in open court this 11th day of April, 1949.”

At the time of making the last above quoted Order the following colloquy and comment between the Court and counsel took place:

“The Court: I think I can order a pro tanto satisfaction of judgment with respect to the full amount of thirty-one odd thousand dollars, save and except as to the disputed item of approximately \$6,000 as and for interest claimed by the plaintiff. With respect to interest, it appears to this court there is a dispute thereon, and there is a possibility the parties can reach a stipulation.

The court will enter an order pro tanto in satisfaction of judgment on the tender of \$31,000 to your client without prejudice to their right to dispute the matter of interest.

However, I desire there be a full and complete exposition to our Circuit Court of the factual background.

Mr. Thornton: Either by the filing of the entire transcript or by an agreement of the parties satisfactory to the court.

The Court: Either by agreement or by the full

transcript. I think you can get up an agreed statement, and I will aid and assist you.

Let us see the nature of the stipulation on the agreed statement of facts.

Mr. Cunningham: Your Honor will grant our motion to amend the judgment in respect to the denial of the interest?

Mr. Thornton: I think there should be a bond for costs on appeal. We have overpaid costs but I didn't ask to retax them, but I think they should be. He has asked for a waiver of that.

Mr. Cunningham: Waiver of what?

Mr. Thornton: That you be required to file no bond.

The Court: For the reason heretofore stated, it is the order of this court that plaintiffs are not entitled to interest on the judgment on the amount claimed. That is the order of the court. I have made that clear in my minute order. So any provision in your findings and any provision in your proposed judgment are to be amended accordingly, to delete therefrom any claim with respect to interest.

Mr. Cunningham: But the judgment itself does not show that. In other words, if we went up to the Circuit Court of Appeals from the judgment alone on the question of interest, the court could not see from the judgment itself that interest was not allowed. It would neither be affirmative or negative because there is no statement in the judgment itself that interest was disallowed.

Mr. Thornton: I don't quite agree with the verbiage.

The Court: I think I can affirmatively rule that interest is not allowed. You can amend the judgment and include an additional paragraph in the light of the findings that the court concludes that interest is not allowed.

Mr. Cunningham: Shall I prepare an amended judgment?

The Court: You might prepare a supplement to the judgment.

Mr. Thornton: I have no objection to that at all.

The Court: If you desire to have the matter clearly focused in the judgment you can include that.

Mr. Thornton: But I understand there is a pro tanto satisfaction.

The Court: Yes, and I would have to approve it and you gentlemen will have to stipulate to it.

Mr. Cunningham: Will you prepare that?

Mr. Thornton: No, I won't. I submitted one proposed satisfaction.

Mr. Cunningham: I never saw it.

Mr. Thornton: It was submitted to your office.

The Court: I will aid and assist counsel in any fashion on this matter.

Mr. Thornton: I will try to devote time in the meantime, but I would like to make it very clear that I won't agree to any statement of facts that does not give the factual issue on the various claims that were made on quantities and values. Outside of that I would like to see them pass on it.

The Court: I have no doubt presently that this factual background is vital.

All right, that is all.”

The Court ordered the release of the moneys paid into court, reserving and preserving to plaintiffs their right of appeal from that portion of the judgment which denied to them the recovery of interest, and included the following provision in said Order:

“It Is Further Ordered that plaintiffs, in the event of appeal from that portion of the judgment denying recovery of interest, pursue such appeal upon an agreed statement of facts, or if such agreement be not reached, then upon the entire record or such portions of the record as the respective parties may designate in accordance with the provisions of Rule 75A, F. R. C. P.”

Said Order was filed on the 14th day of April, 1949, at which time the following colloquy took place between Court and counsel:

The Court: Are you satisfied, Mr. Thornton?  
(with Court order)

Mr. Thornton: I understand your Honor signed it.

The Court: Have you had an opportunity to read it (order denying interest)?

Mr. Thornton: Yes, I think it covers it sufficiently so that everybody is protected. In other words, I think we are in a position—We have a very simple question, I believe, provided counsel can agree. In fact, there may be some trouble, because in my opinion it may be necessary to advance a different position and theorization, in order to show whether or not it is possible for us ever to

reach an amount under the code section. That, I think, is necessary. Those things are set forth in the proofs of loss, in the pleadings, and in the various statements filed by counsel. I think that we should be able to reach an agreement. However, I think your order does sufficiently protect us under 75 and 75-A, so that if we cannot get together we can procure a complete transcript.

The Court: Yes, I think the order is sufficient. However, if such an agreement be not reached, then the entire record, or such portions of the record as are pertinent, may be produced. However, the order is that a full and complete exposition be given to our court of appeals, and under that they have a composite of this trial. Otherwise, I cannot see how a reviewing body could entertain and pass upon that legal question concerning the legality of the interest.

Mr. Thornton: That was the ground of my objection. I am glad to have the court again state that. And, if there is any question on that, I ask the court's permission to have the court's statement on the last hearing, and as of today, made a part of the record.

The Court: You may have that in amplification of my former brief memorandum.

I think I made it clear that the order may be read upon the record and the receipt signed.

The parties hereto have accepted the judgment of the Court, the defendants by paying the amount provided therein and the plaintiffs by accepting said amount in full satisfaction of all claims, save

and except as to plaintiffs' asserted right to interest and the right to appeal from that portion of the judgment denying them recovery of any interest on the amounts awarded by the Court.

This appeal is from that portion of the Judgment denying the plaintiffs interest on the amount found due by the Court, and the only subject for consideration by the Circuit Court of Appeals is the correctness of the Court's ruling denying plaintiffs' claim for interest.

The foregoing constitutes and is an agreed statement made by and between the above-named plaintiffs and the above-named defendant insurance companies under and pursuant to Rule 76 of the Federal Rules of Civil Procedure. A copy of the Notice of Appeal showing its filing date is attached hereto; also a Concise Statement of Points Relied upon by Appellants.

/s/ NEIL CUNNINGHAM,  
Attorney for Plaintiffs-  
Appellants.

THORNTON & TAYLOR.  
/s/ H. A. THORNTON,  
/s/ E. M. TAYLOR.  
Attorneys for Defendant  
Insurance Companies.

Approved:

/s/ GEORGE B. HARRIS,  
Judge, U. S. District Court.

[Endorsed]: Filed June 17, 1949. ,

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Final Judgment entered in this action, as ordered amended on the 11th day of April, 1949, and that portion only which orders, adjudges and decrees that plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, from the 4th day of March, 1946, and ordering that plaintiffs take nothing as and for interest on said amounts.

Dated this 9th day of May, 1949.

/s/ NEIL CUNNINGHAM,

/s/ JAY PFOTENHAUER,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

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CONCISE STATEMENT OF POINTS RELIED  
UPON BY APPELLANTS

The contract of insurance clearly provides for the manner of ascertainment of the amount of loss and that such loss "shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisalment; but if such ascertainment is not had or made within sixty days after

the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.”

Under the decision of *Koyer v. Detroit Fire & Marine Insurance Company*, 9 Cal. (2d) 336, the Supreme Court of California held that Section 3287 of the California Civil Code, providing when a person is entitled to recover damages, he may also recover interest thereon, was applicable to a fire loss case by reason of the provisions of the policy itself.

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[Title of District Court and Cause.]

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon the making of an Order by the Court on January 6, 1948, denying the motion of the defendant Levy for severance and the denial of the motion of the defendant Insurance Companies for summary judgment in favor of said defendants and each of them on the Fourth and Separate Cause of Action stated in the complaint, plaintiffs agreed to waive a jury which had been called, and the case proceeded to trial before the Court on the 6th, 7th, 8th, 9th and 10th days of January, 1948. Pursuant to a further order of said Court made on the 29th day of March, 1948, the order theretofore entered submitting said case was vacated and set aside, and the case was ordered placed on the calendar for May 21, 1948, “for the purpose of taking

further testimony"; Neil Cunningham and Jay Pfoenhauer appeared for and on behalf of the plaintiffs, Thornton & Taylor, by H. A. Thornton, appeared for and on behalf of the defendants Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company, and Wolff & Wolff, by Harry K. Wolff, Sr., appeared for and on behalf of the defendant George A. Levy:

Evidence both oral and documentary was taken and received at the trial in January, 1948, and at subsequent hearings on further trial by the Court, on the 27th and 28th days of May, the 27th and 28th days of October and the 5th day of November, 1948, at the conclusion of which, said cause was argued and submitted.

Upon conclusion of the initial trial on January 10, 1948, pursuant to motion of the defendant Levy, the cause was dismissed as to him upon the fourth cause of action set forth in the complaint.

Upon consideration of all of the foregoing and the evidence, both oral and documentary, introduced at the trial and further trial of said cause, the Court now makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### I.

As to the First Cause of Action stated in plain-

tiffs' complaint, the Court finds that the allegations contained in Paragraphs I, III, IV, V, VI and VII are true.

## II.

As to Paragraph VIII of said first cause of action, the Court finds that the plaintiffs were the owners of all the property described in the policies mentioned and designated in Paragraphs III, IV, V, VI and VII (and which said policies are attached to the complaint and are marked Exhibits "A," "B," "C," "D" and "E"); that said property consisted of 3,970,408 board feet of lumber, consisting of troughs and slats, and 202,020 pieces called slats; that the value of said lumber so insured by said policies was \$31,468.21.

## III.

With reference to Paragraph IX of the first cause of action set forth in the complaint, the Court finds that if it was the intention of plaintiffs to have the said lumber insured for the amount of \$125,000 for the term of one year by the standard form of fire insurance policy prescribed by the laws of the State of California and/or that it was not the intention of plaintiffs to have said lumber insured in a provisional amount or for a fluctuating amount which would require the filing of monthly or other periodical reports showing the value or quantity of lumber on hand, such intention was not communicated, known to, or acquiesced in by the defendants Agricultural Insurance Company, Federal Union

Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company.

## IV.

It is true that the policies of insurance described in the first cause of action set forth in the complaint herein were delivered to plaintiffs on or before September 5, 1945; it is true that plaintiffs then learned they had not received the form or type of insurance desired and requested by them; it is true that hereafter, to wit: on or about the 2nd or 3rd of October, 1945, plaintiffs requested the defendant George A. Levy to obtain fire insurance covering said lumber in the sum of \$125,000, and further requested said defendant Levy to obtain such insurance under the California Standard Form of Fire Insurance Policy without qualification or endorsements requiring the filing of monthly or periodical reports and without any limitation as to the value of said lumber except as to the amount of insurance provided for therein.

## V.

It is not true that at said time said defendant insurance companies, or any of them, by or through said George A. Levy, orally or otherwise agreed to or did insure plaintiffs in the amount of \$25,000 each, or a total of \$125,000, for a term of one year beginning on said October 2nd or 3rd, 1945, or any other term or period, against all loss or damage by fire upon said stock of lumber which was then and there owned by plaintiffs; it is true that said George

A. Levy was an Agent of the defendant Agricultural Insurance Company, but was not an Agent for any of the other defendant insurance companies; that as such agent for defendant Agricultural Insurance Company he did not undertake to, nor did he, bind said defendant Agricultural Insurance Company to provide or furnish said insurance in the amount of \$25,000 or in the amount of \$125,000, as alleged in paragraph X of said first cause of action.

#### VI.

By reason of the foregoing Finding V, it is unnecessary to make findings upon paragraphs XI, XII, XIII, XIV and XV of the First Cause of Action set forth in the Complaint herein.

#### VII.

As to the Second and Separate Cause of Action stated in plaintiffs' complaint herein, the Court finds that George A. Levy was the duly appointed and licensed agent of the defendant Agricultural Insurance Company, as therein alleged, but that said defendant Agricultural Insurance Company did not, through said George A. Levy, its agent, enter into an oral contract of insurance, insuring plaintiffs in the amount of \$125,000 for the term therein stated against loss or damage by fire upon and to 5,000,000 board feet of lumber and did not agree to execute and deliver or deliver to plaintiffs a policy of insurance in the standard form prescribed by the laws of the State of California, evidencing such contract of insurance.

VIII.

It is true, as alleged in said Second Cause, paragraph VI, that defendant Agricultural Insurance Company has never issued or delivered said policy of insurance for \$125,000 to plaintiffs and has refused to do so.

IX.

By reason of the foregoing Findings as to the Second Cause, it is unnecessary to make findings upon Paragraphs V, VII, VIII, IX and X of said Second Cause of Action set forth in the complaint.

X.

As to the Third and Separate Cause of Action stated in plaintiffs' complaint herein, the Court finds:

1. The allegations of Paragraph I thereof, incorporating each and every allegation contained in Paragraphs I to VIII, inclusive, of the First Cause of Action, the same as though set forth in full, are true except as to Paragraphs II and VIII so incorporated, as to which separate findings are hereinafter made.

2. It is true that plaintiffs, at the times of the issuance of the policies referred to and described in Paragraphs III, IV, V, VI and VII of said First Cause of Action, and continuously after such issuance, up to and including the time of the fire herein mentioned, were the owners of all the property described in said policies and insured thereunder.

3. The quantity of board feet of lumber so in-

sured was 3,970,408, consisting of troughs and slats, 202,020 pieces of which were slats.

4. That the value of said lumber at the time of the fire was as follows: For the troughs, \$5.00 per thousand board feet; For the pieces called "slats," 6 cents each.

5. It is true that the location and value of said lumber were reported to and known by the defendant insurance companies, and each of them, prior to the 30th of September, 1945.

6. It is true that on October 6, 1945, said 3,970,408 board feet of lumber, consisting of troughs and slats, 202,020 pieces of which were slats, so insured, was, with the exception of one (1%) per cent thereof, totally destroyed by fire.

7. That the loss and damage sustained by plaintiffs by reason of such destruction by fire of said lumber was and is the sum of Thirty-one Thousand One Hundred Fifty-three and 52/100 Dollars (\$31,153.52).

8. It is true that by reason of said loss and pursuant to the provisions of the policies hereinbefore referred to, said defendant insurance companies became liable to plaintiffs for said amount of \$31,153.52, and that each said defendant insurance company, in accordance with the terms of said policies, was liable to plaintiffs for twenty per cent (20%) thereof, in the amounts hereinafter set forth opposite their names, as follows:

Agricultural Insurance Company.....	\$6,230.70
Federal Union Insurance Company...	\$6,230.70
Globe & Rutgers Fire Insurance Company .....	\$6,230.70
The Homestead Fire Insurance Company .....	\$6,230.70
New Hampshire Fire Insurance Company .....	\$6,230.70

9. That in accordance with the terms and conditions of said policies said amounts, and each thereof, became due and payable ninety (90) days after the filing of preliminary proofs of loss.

10. That preliminary proofs of loss were filed with and received by said insurance companies on December 4, 1945.

11. That the defendant insurance companies, and each of them, have not paid to plaintiffs the sums due under said policies above listed, nor any part of any of said sums.

12. That plaintiffs performed all the conditions of said policies on their part to be performed.

XI.

As to the Fourth and Separate Cause of Action stated in plaintiffs' complaint, the Court finds that the allegations of Paragraphs I and II are true.

XII.

As to the allegations contained in Paragraph III of said Fourth Cause of Action, the Court finds that on October 2, 1945, plaintiffs were the owners of 3,970,408 board feet of lumber, consisting of troughs

and slats, 202,020 pieces of which were slats, and which lumber was contained in and located upon the premises described in Paragraph III of said Fourth Cause of Action and was then and there insured in the sum of \$87,500 against loss or damage by fire; it is not true that the value of said lumber was \$125,000, but was \$31,468.20.

#### XIII.

It is not true, as is alleged in Paragraph IV of said Fourth Cause of Action, that on or about October 2, 1945, or at any other time, at Vallejo, California, or elsewhere, said defendant George A. Levy orally contracted with plaintiffs to procure additional fire insurance upon and covering said stock of lumber which would increase the insurance coverage thereon to \$125,000, nor is it true that plaintiffs did then and there agree to pay the additional premiums required therefor; it is true that said plaintiffs requested said defendant George A. Levy to procure additional fire insurance on said lumber at or about said time, but that the said George A. Levy did not agree to procure such insurance.

#### XIV.

It is true that on October 6, 1945, all said lumber was destroyed, with the exception of 1% thereof, by fire, but that the quantity insured was not 5,000,000 board feet but was the quantity hereinbefore stated, to wit, 3,970,408 board feet; it is not true that the loss and damage sustained by plaintiffs by reason of such destruction by fire of said lumber was or

is the sum of \$123,750, but such loss and damage was and is the sum of \$31,153.52.

XV.

It is not true that as a result of any undertaking on the part of the said defendant George A. Levy to procure said additional fire insurance or any part thereof, or as a direct or proximate result of any failure on his part so to do, plaintiffs were damaged in the sum of \$37,125 or any other sum.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing Findings of Fact, the Court finds and concludes:

1. That defendant insurance companies issued and delivered to plaintiffs the policies of fire insurance attached to the complaint and marked Exhibits "A," "B," "C," "D" and "E."

2. That said policies were in full force and effect on October 6, 1945, on which date a fire occurred and destroyed ninety-nine (99%) per cent of the lumber described in said policies at the location therein stated, to wit: Benicia Tannery property.

3. That thereafter and within the time provided in said policies plaintiffs furnished to said defendant insurance companies, and each of them, proofs of loss covering the quantity and value of the lumber so destroyed, but the Court concludes that the quantity was not 5,000,000 board feet, but was as follows: 3,830,704 board feet of troughs and 200,000 slats.

4. That the value of the said troughs was and

is \$5.00 per thousand board feet, or a total of \$19,153.52.

5. That the value of 200,000 slats destroyed by said fire was and is 6c each, or a total of \$12,000.00.

6. That the total loss suffered by plaintiffs as a result of said fire was the sum of \$31,153.52.

7. That by the terms of said policies of fire insurance (lines 138 to 140, inclusive) the loss thereunder became due and payable ninety (90) days after receipt by each said insurance company of the preliminary proof of loss; that the proofs of loss herein were made to and received by each said defendant insurance company on December 4, 1945.

8. That plaintiffs have judgment against defendant insurance companies and each of them, as follows:

Agricultural Insurance Company . . . . .	\$6,230.70
Federal Union Insurance Company . . . . .	\$6,230.70
Globe and Rutgers Fire Insurance Company . . . . .	\$6,230.70
The Homestead Fire Insurance Company . . . . .	\$6,230.70
New Hampshire Fire Insurance Company . . . . .	\$6,230.70

9. That plaintiffs have and recover their costs of suit herein, to be taxed against the defendant insurance companies.

10. That the plaintiffs take nothing against the defendant George A. Levy by reason of the allegations contained in the Fourth Cause of Action stated in their complaint, but that said defendant

George A. Levy have and recover his costs of suit herein against plaintiffs, to be taxed.

/s/ GEORGE B. HARRIS,

Judge of the Above-Entitled  
Court.

Service of the within Findings of Fact and Conclusions of Law is acknowledged, by receipt of copy thereof, this 25th day of February, 1949.

THORNTON & TAYLOR.

By /s/ K. NORWOOD,

Attorneys for Defendant  
Insurance Companies.

WOLFF & WOLFF.

By /s/ HARRY K. WOLFF,

Attorney for Defendant,  
George A. Levy.

Receipt of amended pages 2, 3, 5, 7, 8 and 9 of the Findings of Fact and Conclusions of Law, and of amended page 2 of the Judgment in the within case, as ordered modified by the Court, is hereby acknowledged this 28th day of March, 1949.

THORNTON & TAYLOR.

By /s/ THORNTON & TAYLOR.

Attorneys for Defendant  
Insurance Companies.

WOLFF & WOLFF.

By /s/ WOLFF & WOLFF,

Attorneys for Defendant  
George A. Levy.

[Endorsed]: Filed March 29, 1949.

In the District Court of the United States, in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

### JUDGMENT

This cause came on regularly for trial on the 6th day of January, 1948, and proceeded thereafter on the 7th, 8th, 9th and 10th days of January, 1948; after submission thereof, a further order was made

vacating said order of submission, and the cause was ordered placed on the calendar of the Court for the 21st day of May, 1948, "for the purpose of taking further testimony"; at that date the cause was continued to May 27th, 1948, and further trial was resumed on the 27th and 28th days of May, 1948, the 27th and 28th days of October, 1948, and the 5th day of November, 1948, at the conclusion of which said cause was argued and submitted; a jury having been waived on January 6th, 1948, said cause was tried before the Court; Neil Cunningham and Jay Pfotenhauer appeared as attorneys for Plaintiffs; Thornton & Taylor, by H. A. Thornton, appeared as attorneys for the defendants Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company; and Wolff & Wolff, by Harry K. Wolff, Sr., appeared as attorney for defendant George A. Levy; and the Court having heard the testimony and examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs have judgment against said defendant insurance companies as follows:

- Agricultural Insurance Company, for . \$6,230.70
- Federal Union Insurance Company,
- for . . . . . \$6,230.70

Globe and Rutgers Fire Insurance

Company, for.....\$6,230.70

The Homestead Fire Insurance

Company, for.....\$6,230.70

New Hampshire Fire Insurance

Company, for.....\$6,230.70

and for costs of suit herein, to be taxed.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs take nothing against the defendant George A. Levy by reason of the allegations contained in the Fourth Cause of Action stated in their complaint, but that said defendant George A. Levy have and recover his costs of suit herein against plaintiff, to be taxed.

Dated: March 29, 1949.

/s/ GEORGE B. HARRIS,  
Judge of Said Court.

Entered in Civil Docket March 3, 1949.

[Endorsed]: Filed Mar. 29, 1949.

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[Title of District Court and Cause.]

ORDER AMENDING FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND JUDGMENT

The Notice of Motion to Alter or Amend the Judgment herein having been served within ten days after the entry of judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and said motion having come on regularly for hearing

this 11th day of April, 1949, Neil Cunningham appearing for the plaintiffs and H. A. Thornton appearing for the defendant insurance companies, and the Court having considered the matter,

It Is Hereby Ordered that the Findings of Fact and Conclusions of Law heretofore made and entered herein be and they are hereby amended as follows:

There shall be added to Finding X, page 7, at line 4, the following:

“13. That plaintiffs are not entitled to interest on said sums due under said policies above listed.”

It Is Hereby Further Ordered that the Conclusions of Law be and the same are hereby amended in the following particular:

There shall be added thereto Paragraph 8-a on page 9 between lines 16 and 17, reading as follows:

“8-a. That plaintiffs are not entitled to interest on each said amount from the 4th day of March, 1946.”

It Is Further Ordered that the Judgment heretofore entered herein be and the same is hereby amended in the following particular:

On page 2, between lines 24 and 25, there shall be added the following paragraph:

It Is Further Ordered, Adjudged and Decreed that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs,

and that plaintiffs take nothing as and for interest on said amounts.”

Done in open court this 11th day of April, 1949.

/s/ GEORGE B. HARRIS,  
Judge of Said Court.

Receipt of a copy of the above Order is hereby acknowledged this 11th day of April, 1949.

THORNTON AND TAYLOR.

By /s/ H. A. THORNTON,  
Attorneys for Defendant  
Insurance Companies.

[Endorsed]: Filed April 11, 1949.

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[Endorsed]: No. 12275. United States Court of Appeals for the Ninth Circuit. F. W. Carlstrom and Mrs. George (Reta) Taitt, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of Associated Packing Company, Appellant, vs. Agricultural Insurance Company, Federal Union Insurance Company, Globe and Rutgers Fire Insurance Company, The Homestead Fire Insurance Company and New Hampshire Fire Insurance Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 20, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the District Court of the United States in and for the Southern Division of the Northern District of California

No. 26235 H

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, Individually and as Co-Partners, Doing Business Under the Firm Name and Style of ASSOCIATED PACKING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a Corporation; FEDERAL UNION INSURANCE COMPANY, a Corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a Corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a Corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation; BLUE COMPANY, a Corporation; GEORGE A. LEVY, JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

### NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Final Judgment entered in this action, as ordered amended on the 11th day of April, 1949, and that portion only which orders, adjudges and

decrees that plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, from the 4th day of March, 1946, and ordering that plaintiffs take nothing as and for interest on said amounts.

Dated this 9th day of May, 1949.

/s/ NEIL CUNNINGHAM,  
/s/ JAY PFOTENHAUER,  
Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this court, in the above-entitled case, and that they constitute the Record on Appeal herein, to wit:

Record on Removal containing the Complaint.

Answer to Complaint.

Notice of Demand for Jury Trial.

Amended Answer to Complaint.

Notice of Appeal.

Agreed Statement of Facts.

Reporter's Transcript for January 6, 1948.

Reporter's Transcript for January 10, 1948—  
Testimony of Arthur L. Miller.

Reporter's Transcript for April 11, 1949—Par-  
tial Transcript.

Reporter's Transcript for April 14, 1949—Par-  
tial Transcript.

Findings of Fact and Conclusions of Law.  
Judgment.

Order Amending Findings of Fact, Conclusions  
of Law and Judgment.

In Witness Whereof, I have hereunto set my  
hand and affixed the seal of said District Court  
this 18th day of June, A.D. 1949.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ M. E. VAN BUREN,  
Deputy Clerk.

United States Court of Appeals for the  
Ninth Circuit

No. 12275

P. W. CARLSTROM and MRS. GEORGE  
(RETA) TAITT, Individually and as Co-  
Partners, Doing Business Under the Firm  
Name and Style of ASSOCIATED PACK-  
ING CO.,

Plaintiffs,

vs.

AGRICULTURAL INSURANCE COMPANY, a  
Corporation; FEDERAL UNION INSUR-  
ANCE COMPANY, a Corporation; GLOBE  
AND RUTGERS FIRE INSURANCE COM-  
PANY, a Corporation; THE HOMESTEAD  
FIRE INSURANCE COMPANY, a Corpora-  
tion; NEW HAMPSHIRE FIRE INSUR-  
ANCE COMPANY, a Corporation; BLUE  
COMPANY, a Corporation; GEORGE A.  
LEVY, JOHN DOE, JANE DOE and RICH-  
ARD ROE,

Defendants.

STATEMENT OF POINTS AND  
DESIGNATION

In compliance with Rule 19 of the Rules of the  
United States Court of Appeals for the Ninth Cir-  
cuit, appellants hereby designate

Agreed Statement of Facts.

Findings of Fact, Conclusions of Law and  
Judgment.

Order Amending Findings of Fact.

Notice of Appeal.

Certificate of Clerk.

as the parts of the Record in the above-entitled case which are considered necessary for the consideration by the Court of the appeal herein.

A concise statement of the points on which appellants intend to rely on the appeal follows:

“The contracts of fire insurance (California Standard Form Fire Insurance Policy—Section 2070, Insurance Code) clearly provide for the manner of ascertainment of the amount of loss and that such loss ‘shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisalment; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.’

“Under section 3287, California Civil Code, as construed and applied by the Supreme Court of California in the case of

*Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal. 2d 336, a person ‘entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover inter-

est thereon from that day, \* \* \*’ pursuant to the prescribed provisions of said Standard Form policy.

“Section 1652, Title 28, United States Code, provides that the laws of the several states, with certain exceptions therein stated, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

“In denying to plaintiffs interest on the amount of loss suffered, the District Court failed and refused to adhere to decisions of the California Supreme Court, the Supreme Court of the United States (*Concordia Insurance Co. of Milwaukee v. School District No. 98*, 252 U. S. 541) and said section 1652, Title 28, United States Code.”

Yours very truly,

/s/ NEIL CUNNINGHAM.

[Endorsed]: Filed June 27, 1949.

No. 12,275

IN THE

United States Court of Appeals

For the Ninth Circuit

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P. W. CARLSTROM and MRS. GEORGE  
(RETA) TAITT, individually and as  
co-partners, doing business under the  
firm name and style of Associated  
Packing Co.,

*Appellants,*

vs.

AGRICULTURAL INSURANCE COMPANY, a  
corporation; FEDERAL UNION INSUR-  
ANCE COMPANY, a corporation; GLOBE  
AND RUTGERS FIRE INSURANCE COM-  
PANY, a corporation; THE HOME-  
STEAD FIRE INSURANCE COMPANY, a  
corporation; NEW HAMPSHIRE FIRE  
INSURANCE COMPANY, a corporation,  
et al.,

*Appellees.*

APPELLANTS' OPENING BRIEF.

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NEIL CUNNINGHAM,

Balfour Building, San Francisco, California,

*Attorney for Appellants.*

JUL 29 1948



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IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

P. W. CARLSTROM and MRS. GEORGE  
(RETA) TAITT, individually and as  
co-partners, doing business under the  
firm name and style of Associated  
Packing Co.,

*Appellants,*

vs.

AGRICULTURAL INSURANCE COMPANY, a  
corporation; FEDERAL UNION INSUR-  
ANCE COMPANY, a corporation; GLOBE  
AND RUTGERS FIRE INSURANCE COM-  
PANY, a corporation; THE HOME-  
STEAD FIRE INSURANCE COMPANY, a  
corporation; NEW HAMPSHIRE FIRE  
INSURANCE COMPANY, a corporation,  
et al.,

*Appellees.*

**APPELLANTS' OPENING BRIEF.**

---

**STATEMENT OF JURISDICTION.**

The cause of action involved herein was originally  
filed in the Superior Court of the State of California,

in and for the City and County of San Francisco. Appellees caused the removal thereof to the United States District Court on the ground of diversity of citizenship, pursuant to Title 28, Section 1332 of the United States Code.

The amount in controversy exceeds the sum of \$3,000.

The trial of the action before the Federal District Court resulted in a judgment for appellants against each appellee insurance company in the amount of \$6,230.70, totalling \$31,153.52.

In said judgment, the Federal District Court ordered, adjudged and decreed

“\* \* \* that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, and that plaintiffs take nothing as and for interest on said amounts.”

This appeal is from that portion of the judgment only, denying interest to appellants on the amount found due and for which judgment was rendered, and is prosecuted to this Court pursuant to the provisions of Title 28, Sections 1291 and 1294, United States Code, and in conformance to Rule 76, Federal Rules of Civil Procedure. The agreed statement, findings of fact and conclusions of law and the judgment constitute the record on appeal. (Record, pp. 2-26, 29-39, 40-42.)

### STATEMENT OF THE CASE.

The contracts of fire insurance (Standard Form fire insurance policy, prescribed by section 2071 of the Insurance Code of California) covering the loss involved herein, provide for the manner of ascertainment of the amount of loss; that such loss "shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisal; *but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.*" (Lines 139 and 140.) (Italics for emphasis.)

Section 3287 of the California Civil Code, to the effect that a "person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, *is entitled also to recover interest thereon from that day, \* \* \**" (Italics for emphasis) has been construed and applied by the Supreme Court of California in respect to the provisions of the California Standard form fire insurance policy as authorizing the recovery of interest from the date the loss was due and payable. That decision is

*Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal. (2d) 336, 70 Pac. (2d) 927.

Section 1652, Title 28, United States Code, provides that the laws of the several States, with certain exceptions (not applicable hereto) shall be regarded as rules of decisions in civil actions in courts of the United States, in cases where they apply.

**SPECIFICATION OF ERROR.**

In refusing to allow interest on the amount of loss from the date such loss was due and payable, the Federal District Court erred by failing to conform to the decision of the Supreme Court of California, the Supreme Court of the United States

(*Concordia Ins. Co. of Milwaukee v. School*  
*Dist. No. 98, 51 S. Ct. 275; 282 U.S. 545; 75*  
*L. Ed. 528*)

and to the provisions of said Section 1652, Title 28 of the United States Code.

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**ARGUMENT.**

**(a) LOSS CAPABLE OF DETERMINATION BY CALCULATION.**

The agreed statement shows that appellants and appellee insurance companies disagreed as to the amount of loss claimed; that shortly after proofs of loss were filed with the insurance companies, they admitted appellants' loss in the total amount of \$14,320.00. (Record p. 8.)

Insurance against loss by fire in the total amount of \$87,500.00, under said policies, was issued to appellants, and such insurance was in full force and effect at the time of the fire (October 6, 1945) which destroyed ninety-nine (99%) per cent of the lumber and material insured. (Record pp. 3, 37.)

The findings of fact and agreed statement clearly establish that appellants performed all conditions and complied with all provisions of said policies. (Finding X (12), Agreed Statement, Record pp. 6-7 and 35.)

One such condition of the policies reads :

“If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisalment of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisalment, select a competent and disinterested umpire.” (Lines 115-119, Agreed Statement, Record p. 5.)

Failure on the part of appellants to meet any demand for appraisalment would have constituted a bar to bringing suit on the policies.

*Winchester v. North British and Merc. Ins. Co.*, 160 Cal. 1, 116 Pac. 63;

*Insurance Policy Annotations*, Vol. 1, Part Two, pp. 293, et seq. and 1945 Supp. thereto, published by Section of Insurance Law, American Bar Association.

The fact that suit was instituted on the policies without a plea in bar thereto for such failure of appellants to meet the demand of appellees, insurance companies, for an appraisalment evidences one of two things, to-wit: That no demand for appraisalment was made, not made timely, or it was waived by appellees, insurance companies. Through no fault of appellants, an appraisalment was not undertaken or had.

The decision of the Supreme Court of California in the *Koyer* case, supra, construing and applying section 3287 of the Civil Code of California to the provisions of the Standard Form California Fire Insurance Policy, is soundly based upon the terms and conditions of the policy *as constituting an agreement* "upon the use of that method in fixing the amount of the insurers' liability" by which the insured and the insurer bound themselves to determine the amount of loss. It was clearly decided in that case that appellant insurance company there could not "consistently ask the Court to declare the method they have adopted as an important element of their contract to be inadequate and uncertain and insist that trial of the issue in Court is necessary for a correct and just determination." (9 Cal. (2d) p. 346.) In support of the statement that the "loss was capable of being made certain by calculation" and that therefore interest was allowable "from the date the right of recovery is vested", the Court said (p. 345):

"\* \* \* It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and *these are the methods of adjustment contemplated by the parties and stipulated in the policies.* Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. \* \* \*"  
(Italics for emphasis.)

## (b) PRIOR DECISION OF THIS COURT NOT NOW CONTROLLING.

Under the decision of

*National Union Fire Ins. Co. v. Calif. Cotton  
Credit Corp.*, 76 Fed. (2d) 279

in February, 1935, approximately *two years prior* to the decision of the Supreme Court of California in the *Koyer* case, *supra*, it was stated (p. 290):

“No case decided by the Supreme Court of California has been called to our attention, and we have found none that is controlling in the situation presented in the case at bar. \* \* \*”

At the time that decision was handed down the latest expression of the Supreme Court of California on the subject of allowance of interest was that contained in *Anselmo v. Sebastiani*, 219 Cal. 292, 26 Pac. (2d) 1.

The following cases were also cited and referred to by this Court:

*Gray v. Bekins*, 186 Cal. 389, 199 P. 767;

*Perry v. Magneson*, 207 Cal. 617, 279 P. 650;

*Mabrey v. McCormick*, 205 Cal. 667, 272 P. 289.

None of the foregoing cases cited *involved a loss under the Standard Form Fire Insurance Policy of California*.

This Court, referring to the case of *Anselmo v. Sebastiani*, *supra*, stated (p. 290):

“The court in that case *tends to the view* that whether the damages are liquidated or unliquidated is not determinative of the question of interest.” (Italics for emphasis.)

It was further therein stated (p. 290) :

“In *Gray v. Bekins*, 186 Cal. 389, 399; 199 P. 767, in an action for recovery on the basis of quantum meruit, the court allowed interest from the date the answer was filed because *the answer was construed to be an acknowledgement of the plaintiff's claim to the extent therein admitted and subsequently found due by the trial court*. In that case the court stated the test to be applied was whether or not the exact amount found due was known and admitted by defendant to be due plaintiff. \* \* \*” (Italics for emphasis.)

And referring to *Mabrey v. McCormick*, supra, this Court therein said (p. 290) :

“The court, however, decided that it was by reason of the action of plaintiffs *that the amount due was unliquidated* until determined by judgment of the court so that interest prior to judgment, as damages, was not allowable.” (Italics for emphasis.)

All the foregoing cases referred to and cited by this Court have been definitely modified by the decision of the Supreme Court of California in the *Koyer* case, supra, and the *Koyer* case being the last pronouncement upon the question is controlling upon the Federal Courts of this jurisdiction.

In further support of appellants' contention herein, the case of

*Jacobs v. Farmers Mutual Fire Ins. Co.*, 5 C.A. (2d) 1, 41 P. (2d) 960,

decided by the District Court of Appeal, Third District of California *just one day after the decision of this Court in National Union Fire, etc. v. Calif. Cotton Credit Corp., supra*, is cited in support of appellants' contention. In that case it was held that (pp. 11 and 12):

“(9) When the evidence shows a total loss of the property insured, and a compliance with all of the terms of the policy on the part of an insured person, except such as have been waived by the insurance company, interest is properly included on the amount of the obligation due under the terms of the policy, from the date when the loss is payable. The mere unwarranted denial of the validity of the contract on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable under the provisions of section 3287 of the Civil Code. (26 *C.J.* p. 575, sec. 795; *Rogers v. Manhattan Life Ins. Co. of N.Y.*, 138 Cal. 285, 71 Pac. 348).”

The loss involved in the case at bar was *ninety-nine (99%) per cent total*. (See Agreed Statement, Record p. 37.)

A further reason *National Union Fire, etc. v. Calif. Cotton Credit Corp., supra*, cited and relied upon by the Federal District Court in the memorandum opinion denying the allowance of interest to appellants, is not applicable or now controlling in the case at bar appears from the decision of this Court—that the loss there involved was under policies of *market and crop*

*insurance*. While true such policies contained the same standard provisions, the calculations of loss were of much greater complication and difficulty. But the answer to the contention of *indefinite* determination of the amount of loss is given by the Supreme Court of California in the *Koyer* case, *supra*, as follows (pp. 345 and 346):

“Under the terms of the policies the loss was payable ninety days after receipt of preliminary proofs of loss by the companies. \* \* \* Although defendants *disputed the amount of the loss*, they did not deny liability. \* \* \* If, therefore, the amount of plaintiff’s loss was capable of being made certain *by calculation*, interest was allowable from July 12, 1933, when the loss became payable. \* \* \* In each case total destruction of the building was taken as the basis of the loss. \* \* \* By the terms of the policies the actual value could not exceed the amount which it would cost the insured to repair or replace the property \* \* \*. There was available to the parties *before suit* all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them *or to the court or jury* upon a trial of the question of loss. \* \* \* The principal complaint of the defendants here is that the matter has been taken to court and while contending that calculation and appraisal furnish an uncertain means of fixing the insurers’ liability, *they also complain bitterly of the conclusions reached by the jury*. In support of our conclusion that the loss in question was capable of being made certain by calculation, we refer to the following authorities: \* \* \*” (Italics for emphasis.)

Appellants here also complain bitterly of the conclusion reached by the Federal District Court *in fixing the amount of their loss*. Proof was offered of valuations of the lumber and material destroyed by fire far in excess of the amount determined by the Court. Valuations ranging from \$110,000 to \$220,000 were testified to by witnesses on behalf of appellants. An offer of proof was made that the Government (from whom it was purchased) had appraised the lumber and material shortly before it was sold to appellants (as evidenced by official documents of the War Assets Administration—Exhibit 29 for Identification) at \$55 per thousand board feet, or a total of \$262,607.40! One witness, G. R. Tully, called in the closing days of the “piece-meal” and long delayed trials of the case, was permitted to qualify as an expert on values of lumber “that he had been in the wholesale lumber business for 30 years, sales manager for seven years, and was a qualified inspector of lumber for 40 years, buying and selling lumber” but was not permitted to testify to a valuation of the lumber other than the lumber “slats”. An offer of proof was made, however, that he would testify that all the lumber and material had a market value, at the time of the fire, of \$25 per thousand board feet. (Agreed Statement, Record pp. 14-15.) Such valuation produced a total, by calculation based upon the Government Invoice, of \$111,760.10, or \$99,260.10 based upon the determination of the quantity made by the Federal District Court.

Appellants are constrained to state that the unjustifiably long agreed statement, reached pursuant to Rule 76 of the Federal Rules of Civil Procedure as the basic record on appeal, in lieu of the rather voluminous and cumbersome record which otherwise would have been necessarily prepared at great cost, does not and cannot support the conclusion of the Federal District Court that

“The factual background does not permit or justify the application of *Koyer v. Detroit F. & M. Ins. Co.*, 9 Cal. (2d) 336, upon which plaintiff relies. \* \* \*

Suffice to say that it remained for this Court to ascertain the amount of liability from the evidence introduced at the trial.” (Agreed Statement, Record p. 19.)

It is rather obvious that the Federal District Court seized upon the statement (purely dicta) in the *Koyer* case, p. 345, that

“The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss.”

as the basis for the “factual background.”

That such was not the premise or predicate for the Court's decision in the *Koyer* case has been demonstrated by quotations from the case hereinbefore set forth.

(c) THE GENERAL RULE SUPPORTS APPELLANTS' CONTENTION.

The subject of "Interest" is discussed in

46 *C.J.S.*, sec. 1393, p. 696

and the general rule therein stated is as follows:

"As a general rule interest on the amount payable under a fire insurance policy may be allowed if the insurer has wrongfully withheld payment when due."

Cited in a footnote (5) is the case of

*Hargett v. Gulf Ins. Co.*, 12 C.A. (2d) 449 (1936), 55 Pac. (2d) 1258.

At page 458, the Court said:

"Plaintiff had a right to receive interest upon any amounts to which he may have been entitled under the policies, *as compensation allowed by law* for the detention of money. (*Civ. Code*, sec. 3287; *Coulter v. Howard*, 113 Cal. App. 208 (298 Pac. 140); *Pacific Coast Adjustment Bureau v. Indemnity Ins. Co.*, 115 Cal. App. 583 (2 Pac. (2d) 218); *Jacobs v. Farmers Mutual Fire Ins. Co.*, 5 Cal. App. (2d) 1 (41 Pac. (2d) 960) \* \* \*" (Italics for emphasis.)

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CONCLUSION.

It is respectfully submitted that the trial Court erred in refusing to allow interest on the amount awarded appellants, from the date (March 6, 1946) due, in accordance with the terms and conditions of the policies of insurance, and that the judgment in

respect to such disallowance of interest should be reversed.

Dated, San Francisco, California,  
July 28, 1949.

Respectfully submitted,

NEIL CUNNINGHAM,

*Attorney for Appellants.*

No. 12,275

IN THE

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*Appellees.*

**BRIEF FOR APPELLEES.**

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et al.,

*Appellees.*

**BRIEF FOR APPELLEES.**

---

**AS TO PLAINTIFFS' STATEMENT OF THE CASE.**

While this appeal is confined solely to that portion of the judgment denying interest, there is an attempt

to inject the question of appraisement. This question is not before this Court.

---

**AS TO PLAINTIFFS' SPECIFICATION OF ERROR.**

It is stated, that the District Court erred by failing to conform to the decisions of the Supreme Court of the United States and the Supreme Court of California.

In the case of *Concordia Insurance Company v. School District No. 98*, 51 S. Ct. 27, 282 U.S. 545, 75 L. Ed. 528, the Supreme Court merely held that the District Court was justified in allowing interest "when necessary in order to arrive at fair compensation" where the trial Court would not say what position the Supreme Court of the State could take. Incidentally, this was considered by this Court in *National Union Fire Insurance Co. v. Cal. Cotton Credit Corporation*, 76 Fed. (2d) 279, 289, 290, where it is stated:

"In *Concordia Ins. Co. v. School Dist., etc.*, 282 U.S. 545, 51 S. Ct. 275, 278, 75 L. Ed. 528, the Supreme Court had under consideration a case very similar to the case at bar. In that case interest had been allowed on the amount recovered on a fire insurance policy beginning 60 days from the last date upon which proofs of loss were due under the terms of the policies. The statutes of Oklahoma (Comp. Okla. Stat. 1921, §§ 5972, 5977) relied on as controlling such allowance of interest were almost identical in language with those of California above quoted. The Supreme Court in its opinion stated the general rule that a Fed-

eral Court will follow the decisions of the highest court of a state construing a state statute, and then proceeded to review the decisions of the Supreme Court of Oklahoma construing the statutes above referred to. The conclusion reached by the court was that the state Supreme Court had not definitely construed the statute as applied to the situation then under consideration at the time the trial court entered its judgment, so that the federal court was free to construe the statute for itself. Mr. Justice Sutherland, speaking for the court, then stated: 'In the absence of an authoritative state decision to the contrary, there was nothing in either (sections 5972, 5977, Comp. Okla. Stat. 1921) which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U.S. 243, 257-259, 45 S. Ct. 73, 78, 69 L. Ed. 265, and cases cited. See, also, Standard Oil Co. v. United States, 267 U.S. 76, 79, 45 S. Ct. 211, 69 L. Ed. 519; Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 397, 65 A. 134, 8 Ann. Cas. 298.' "

We shall discuss *Koyer v. Detroit Fire & Marine Ins. Co.* later.

## ARGUMENT.

### (a) THE LOSS WAS NOT CAPABLE OF DETERMINATION BY CALCULATION.

#### 1. Interest is allowable only by virtue of statute.

This point is agreed upon by this Court and by the Supreme Court of California. This Court held as follows:

“Appellee has filed a cross-appeal and assigns as error the failure of the trial court to allow interest from August 1, 1930, the date on which payment was due under the terms of the policies sued on. On July 31, 1933, the trial court ordered that judgment be entered for appellee and against appellants in the amounts set forth in the order, and further that findings of fact and conclusions of law be filed. The conclusions of law, subsequently filed, in part read as follows: ‘\* \* \* together with interest thereon at the rate of seven per cent per annum from the 29th day of July, 1933, to and including the date of judgment. \* \* \*’ Judgment was entered on the findings on November 18, 1933. It is apparent from these facts that the trial court considered these claims to be unliquidated, and, until their amounts were ascertained preparatory to the entry of judgment, no interest should be allowed.

“Cross-appellant contends it was entitled to interest from August 1, 1930, basing its contention on sections 3287, 3302, of the Civil Code of California, which provide:

‘§ 3287. *Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to*

*recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.*

‘§ 3302. *The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.*’ ”

*National Union Fire Ins. Co. v. Cal. Cotton Credit Corporation*, 76 Fed. (2d) 279, 289, 290.

A similar statute was construed by this Court and the following was approved.

“If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. ‘Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.’ ”

*Hansen & Rowland v. C. F. Lytle Co.*, 167 F. (2d) 170, 175.

*Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal. (2d) 336, 70 P. (2d) 927, is not only not in opposition to the decisions of this Court, but is definitely in agreement when the portion of the opinion which counsel has omitted is considered. The Court says:

“*Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs*

*on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and these are the methods of adjustment contemplated by the parties and stipulated in the policies. Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss.*

In other words, the Court held:

1. The recovery of interest depends upon the application of Section 3287 of the Civil Code, which is the basis for the decision of the Court of Appeals in the *National Union* case;
2. That recovery of interest can be had only where the damages are "certain or capable of being made certain from the date the right of recovery is vested";
3. That "the amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss";
4. "The loss in question was capable of being made certain by calculation".

The Court cites *National Union Fire Insurance Co. v. California Cotton Credit Corp.*, (C.C.A.) 76 F. (2d) 279 in support of its conclusions.

As to the cases cited in the *Koyer* case, interest was not allowed in *Mabrey v. McCormick*; *National Union v. Cal. C. C. Corp.*; *Perry v. Magneson*. In the other cases the question of interest was incidental, the amount recovered was practically identical with the claim, or it was capable of being calculated.

A very well considered case is

*Johnson v. Hanover Fire Ins. Co.*, (Wyo.)  
137 P. (2d) 615, 59 Wyo. 120.

This case cites and follows *National Union v. Cal. C. C. Corp.*

In 26 C. J., p. 575, Sec. 795, which is substantially reiterated in 46 C.J.S. p. 696, Sec. 1393, it is said that

“Where the amount to which insured is entitled is withheld after payment is due, interest on the amount found due may be allowed as damages in an action on the policy \* \* \* But where the loss is partial only, and the insurer is unable to estimate its amount and ascertain the sum to be paid, it has been held inequitable to charge the insurer with interest.”

In 154 ALR 1356, 1361, it is said,

“The general rule has been stated to the effect that interest is not recoverable upon unliquidated demands until after they have been merged

in a judgment." To the same effect, see 7 Couch, Cyclopedia of Insurance Law, p. 6191, Sec. 1865.

## 2. As to appraisal.

As we have already pointed out, the question of appraisal, or lack thereof, is not involved. It was not brought up in the pleadings or in the trial; nor is it in the Agreed Statement of Facts, nor in this appeal. It will be noted from quotation from the policy set forth in the Agreed Statement that only the company can demand appraisal and that there is no penalty provided for failure so to do, except that in the event that no demand for appraisal is made, suit may be brought at the end of ninety days after filing proofs of loss.

Neither the *Koyer* case nor the question of arbitration are strangers to this Court. They were thoroughly discussed in the re-hearing of

*Hyland v. Millers Nat. Ins. Co.*, 92 F. (2d)  
462,

which we had the pleasure of arguing before this Court, and in which certiorari was denied.

## 3. As to the findings of the District Court.

This case was originally submitted in January, 1948. It was re-opened, and proceeded in May, October and November, to permit plaintiffs to prove quantities and values. Even after this protracted trial and detailed briefs by both sides, the Court in its order of February 18, 1949, was forced to estimate the quantities of troughs and their value. As

to slats, the Court says: "admittedly, this amount must be an estimate." (Agreed Statement p. 17.)

If the Court was forced to "estimate" quantities and values, after hearing the evidence and reading the briefs, how can it in good conscience be argued that plaintiffs were "entitled to recover damages certain, or capable of being made certain by calculation"? Yet this is the condition imposed by statute on the recovery of interest.

This Court has had occasion to consider a similar statute and to approve the rule that:

"If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. 'Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.'"

*Hansen & Rowland v. C. F. Lytle Co.*, 167 F. (2d) 170, 175.

In view of the fact that after the present case had been submitted on the evidence, arguments and written briefs, upon the sole question of "*What was the market value, on October 6, 1945, of the lumber and shell troughs destroyed by the fire?*" (Agreed Statement, p. 10), it would seem self-evident that the damages were not "certain or capable of being made certain by calculation." It will be noted that this question did not, at that time, involve any "slats", or their values. We shall discuss these more fully later in this brief.

Even after the submission of the issues on this question plaintiffs considered it necessary, and the Court granted their request, to re-open the case "for the purpose of taking further testimony." (Agreed Statement, p. 14.) "Upon re-opening the case for further trial, evidence was introduced on behalf of plaintiffs as to the quantity of troughs *and slats*." (p. 14.) This evidence was offered on May 27 and 28. Plaintiffs were given further opportunities and offered further evidence on October 27 and 28, and again on November 5, and the case was re-argued on November 12. (p. 15.)

Yet, we find that when the Order for Judgment was given on February 18, 1949 (Agreed Statement, p. 16)

"Testimony as to value was so conflicting as to make the court's task of ascertaining actual worth of the troughs all but impossible. The testimony offered by plaintiffs in connection with the possible commercial advantages and purposes to which the lumber contained in the troughs might be suited was not convincing and no predicate established for a value save and except a bare minimum value for the troughs as is. The realities of the situation are ever present and notwithstanding the hopeful expectations of plaintiffs as to the possible use to which the lumber might have been put, the fact remains that there was no credible testimony indicating an immediate commercial use for the lumber contained in the troughs." (Agreed Statement, p. 16.)

“With respect to the slats involved in the litigation: The court once more is compelled to express concern at the great variation in figures disclosed by the testimony of the witnesses and as revealed by the documents submitted in evidence. From these variations the court has been forced to choose an amount certain, which it deems to be the most accurate estimate of the quantity of slats on hand and destroyed by the fire. Admittedly, this amount must be an estimate \* \* \*.” (p. 17.)

“Although the record is replete with inconsistencies and backtrackings on the part of several of plaintiffs’ witnesses, the court is not prepared to hold that such inconsistencies attain the stature of fraud.” (p. 18.)

In view of these statements of the trial Judge, let us re-examine the *Koyer* decision.

“Whether interest was chargeable prior to judgment depends upon the application of Section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff’s loss was capable of being made certain by calculation, interest was allowable \* \* \*”. (p. 931.)

The Order of the trial Court and the statements just above quoted show beyond dispute that no such condition existed in this case, and that quantities and values necessarily were estimates.

The vital factor in the *Koyer* case is contained in the following statement:

“Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proof of loss.” (p. 931.)

In the present case the findings of the Court did not conform to any claim of the plaintiffs in any respect, whether as to amount of insurance, quantities or values. In this respect the case is similar to the *National Union* case, in which this Court said (p. 290):

“It is argued by cross-appellant that the damages allowed by the court were certain by calculation and reference to readily ascertainable and fixed market values, and that the right to such damages became vested on the date payment was due under the terms of the policies, that is 60 days after filing proofs of loss on May 31, 1930. While it is true that the method of determining the liability of the insurers is set forth in the policies it remained for the court to ascertain the amount of such liability from the evidence introduced at the trial. *It is to be noted that in no case was the amount recovered on any claim as large as the amount claimed in the proofs of loss, nor was the liability of the insurers determined by the court on the same basis as that used in making out the proofs of loss.*

“No case decided by the Supreme Court of California has been called to our attention, and we have found none that is controlling in the situation presented in the case at bar. In *Anselmo v. Sebastiani*, 219 Cal. 292, 26 P. (2d) 1, the bill of

particulars furnished by the plaintiffs to defendants was found by the court to be correct, and interest was allowed prior to the entry of judgment under Civil Code, § 3287, because the amount due could be determined by mere calculation from the bill of particulars. The court in that case tends to the view that whether the damages are liquidated or unliquidated is not determinative of the question of interest. In *Gray v. Bekins*, 186 Cal. 389, 399, 199 P. 767 in an action for recovery on the basis of quantum meruit, the court allowed interest from the date the answer was filed because the answer was construed to be an acknowledgment of the plaintiff's claim to the extent therein admitted and subsequently found due by the trial court. In that case the court stated the test to be applied was whether or not the exact amount found to be due was known and admitted by defendant to be due plaintiff. In *Perry v. Magneson*, 207 Cal. 617, 622, 279 P. 650, in an action on a contractor's indemnity bond, it was held that it was necessary for plaintiff to prove a loss by reason of breach of the building contract before he was entitled to recover on the bond and until the amount of such loss was determined by the court, the claim was uncertain and unliquidated and no interest should be allowed. In *Mabrey v. McCormick*, 205 Cal. 667, 669, 272 P. 289, the California Supreme Court stated: 'plaintiffs claim interest from the date of the third bill rendered by them, at which time they state the amount due became certain (section 3287, Civ. Code). Had the court found for them, this contention would be sound.'

“The court, however, decided that it was by reason of the action of plaintiffs that the amount due

was unliquidated until determined by judgment of the court so that interest prior to judgment, as damages, was not allowable.

*“If the proofs of loss filed by the insureds in the case at bar had set out the claims in the manner and amounts as subsequently found due by the trial court, it would seem to follow from the above cases that interest would be allowable from the date payment became due under the policies. However, the appellee did not furnish data to the appellants in the proofs of loss from which appellants’ liability could be calculated as was actually found due by the trial court, and, until their liability was determined by the trial court, it remained uncertain.”*

This case is decisive of the point at issue. It is apparent, not only from the facts in the re-opening of this matter, the evidence introduced, the judgment for \$31,153.52, instead of the amount claimed, and from the written opinion of the court that:

1. “The damages allowed by the Court were ‘not’ certain by calculation and reference to readily ascertainable and fixed market values”; (p. 290.)

2. “It remained for the Court to ascertain the amount of such liability from the evidence introduced at the trial;” (p. 290.)

3. “That in no case was the amount recovered on any claim as large as the amount claimed in the proofs of loss”; (p. 290.)

4. "Nor was the liability of the insurers determined by the Court on the same basis as that used in making out the proofs of loss." (p. 290.)

We find a similar decision, denying interest.

*Merchants Ins. Co. v. Lilgecomont*, 84 Fed. (2d) 685, which relies on the decision in

*Concordia Ins. Co. v. School District*, 282 U.S. 545, 51 S. Ct. 275, 75 L. Ed. 528.

There is no need of discussing *Jacobs v. Farmers Mutual*, 5 C.A. (2d) 1, 41 P. (2d) 960, as the holding is based upon what the Court designates a "mere unwarranted denial of the validity of the contract on the part of the company." There is nothing in common in the two cases.

There is also no need to answer the "argument" that, although the policies in the *National Union* case contained the same conditions, the decision is not applicable because the insurance was market and crop insurance.

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**(b) AS TO VARYING POSITIONS TAKEN BY PLAINTIFFS.**

At no time, either before or during the trial, were plaintiffs consistent in their demands or contentions.

The Court held against them on every contention, except in permitting recovery for troughs in an amount of Nineteen Thousand One Hundred Fifty Three and 52/100 (\$19,153.52) Dollars rather closely approximating the amount of loss admitted by the

companies, viz., Fourteen Thousand Three Hundred Sixty and no/100 (\$14,360.00) Dollars. It is true that the Court allowed them Twelve Thousand and no/100 (\$12,000.00) Dollars for "slats", which were first brought under consideration after the first submission.

These inconsistencies fall into the following categories:

**1. As to insurance.**

Plaintiffs made, and tried to sustain four separate claims as to insurance. These naturally involved questions of law, which could be decided only by a Court. Such matters were not within the province of an appraisal, which is limited to a determination of the amount of loss.

The Court decided against each of plaintiffs' contentions, and in favor of the position taken by the companies. This clearly takes the case out of the line of reasoning in the *Koyer* case, where the recovery was practically in conformity with plaintiffs' claims. The findings of the Court, in respect to these and other contentions bring this case within the reasoning of the *National Union* case, where no recoveries were made on the same basis as the claims.

The contentions as to insurance were:

a. That defendant insurance companies had agreed to insure this property for One Hundred Twenty Five Thousand and no/100 (\$125,000.00) Dollars, an equal amount in each company, and recovery was sought against each company for \$24,750, or a total of One

Hundred Twenty Three Thousand Seven Hundred Fifty and no/100 (\$123,750) Dollars.

b. That defendant Agricultural had entered into an oral contract for One Hundred Twenty Five Thousand and no/100 (\$125,000) Dollars, and recovery was sought against it for the sum of One Hundred Twenty Three Thousand Seven Hundred Fifty and no/100 (\$123,750) Dollars.

c. That defendants had insured this property for Eighty-seven Thousand Five Hundred and no/100 (\$87,500) Dollars, and recovery was sought against each for Seventeen Thousand Three Hundred Fifty and no/100 (\$17,350) or a total of Eighty-six Thousand Seven Hundred Fifty and no/100 (\$86,750) Dollars. The companies admitted issuing policies for Eighty-seven Thousand Five Hundred and no/100 (\$87,500) Dollars, with Seventy Thousand and no/100 (\$70,000) Dollars covering property at this location and Seventeen Thousand Five Hundred and no/100 (\$17,500) Dollars covering at other locations. The Court found as contended by the companies.

d. Plaintiffs endeavored to recover Thirty-seven Thousand One Hundred Twenty-five and no/100 (\$37,125) Dollars from their broker for failure to place that amount of extra coverage.

We realize, of course, that it is perfectly proper to plead alternative claims and inconsistent defenses. Here, however, we have four claims made in a verified complaint, which were all decided adversely to plaintiffs' contentions, and all decided in favor of defendants' claims.

Surely these claims could not be made certain by calculation, thus permitting recovery of interest.

2. As to plaintiffs' pre-trial claims of quantities and values of lumber, for sixteen thousand and no/100 (\$16,000.00) dollars, including two machines, which were not insured, and the property insured by these defendants.

This was described as

“CRATE, Fabricated Wood, Ponderosa and Sugar Pine.”

It was further described as

“Troughs, wood, Ponderosa and Sugar Pine grades ranging from #1 to #3, average #2. Dressed on 2 sides and worked. Air dried. Water stained, mfd. by Columbia Steel Mills, Minetto, N. Y.; stacked in 9 piles. Troughs of various lengths and widths ranging from 26 to 43 inches long, 1½ to 3 inch bottoms and 2½ inch sides ¾ inches thick. Nails spaced about 8 inches apart. Some indication of discoloration and decay due to open storage. Quantity 4,470,408 board feet. (Agreed Statement, p. 7.)”

Plaintiffs' contentions as to quantities were:

- a. In their verified proofs of loss—

“Approximately 5,000,000 board feet. Troughs were Ponderosa and Sugar Pine. Grades predominantly #1 Grade. Dressed on two sides and worked. Air Dried. Water stained to prevent deterioration. Manufactured by Columbia Steel Mills, Minetto, New York. Ranging from 26 to 43 inches long. One-third to 3 inch bottoms, and 2½

inch sides;  $\frac{3}{4}$  inches thick; nails spaced about five inches apart. Valued at One Hundred Twenty Five and no/100 (\$125,000) Dollars." (Agreed Statement, p. 8.)

In the verified complaint, consisting of four counts, it was alleged:

"That said property consisted of 5,000,000 board feet of lumber; that the value of said lumber at all of said times was One Hundred Twenty-Five Thousand and no/100 (\$125,000) Dollars." (Agreed Statement p. 9.)

It is to be noted that neither in the proofs nor in the complaint, both under oath, was there any mention of or claim for "slats".

The quantities were raised from 4,470,408 board feet to 5,000,000. The grades were raised from "average #2" to "predominately #1". The value was raised from a purchase price of Sixteen Thousand and no/100 (\$16,000) Dollars on June 26 (including the two machines) to One Hundred Twenty Five Thousand and no/100 (\$125,000) Dollars on October 6.

The insurance companies admitted a value and loss of Fourteen Thousand Three Hundred Twenty and no/100 (\$14,320) Dollars. The Court found a value and loss as to troughs of Nineteen Thousand One Hundred Fifty and  $\frac{52}{100}$  (\$19,150.52) Dollars.

The Court found that instead of 5,000,000 feet of troughs there were 3,830,704. In addition, the Court found 100,000 board feet, or 200,000 slats. These it

valued at Twelve Thousand and no/100 (\$12,000) Dollars.

The Court thus found an overclaim as to total board feet (3,830,704+100,000) of 1,069,296 board feet.

The Court found an overclaim as to value (\$19,153.52+\$12,000) of \$92,596.48.

Once again, it cannot be claimed that this could "be made certain by calculation".

### 3. Plaintiffs' claims of quantities and values in Court.

Plaintiffs were not satisfied with the increases in quantities and values shown above. They introduced testimony in the original hearing from which they contended "that the Government invoices showed the quantity of lumber to be 5,078,950 and that actual measurement according to the testimony of witnesses showed 5,800,000 board feet." (Agreed Statement p. 10.)

They were forced to retract this and admit that the Government invoices showed 4,470,408 board feet and that the amount destroyed was 4,425,704 feet. (Agreed Statement p. 12.)

They also produced a "Summary of Minimum Valuation" (Agreed Statement p. 11) which they claimed showed values of One Hundred Ten Thousand and no/100 (\$110,000) Dollars, One Hundred Sixteen Thousand and no/100 (\$116,000) Dollars, and Two Hundred Twenty Thousand and no/100 (\$220,000) Dollars.

Here for the first time "slats" were introduced into this case. It was claimed that "of the 4,425,704 board feet shown by said invoice, 690,412 board feet represented slats in the total quantity of 1,650,089". (Agreed Statement p. 13.)

This claim influenced the Court to permit plaintiffs to attempt to prove this claim.

"After a protracted trial, necessitated by the re-opening of the case in order to adduce additional testimony with respect to the quantity of slats involved \* \* \*." (Agreed Statement p. 15.)

After three more hearings, the Court was forced to "estimate" an amount of slats. He found that instead of 690,412 board feet, there were 100,000 board feet. He also found that instead of 1,650,089 slats, there were 200,000.

We thus find an overclaim of 490,412 board feet and an overclaim of 1,450,089 slats.

When we find such overclaims on property not deemed worthy of mention in the verified proofs or complaint; when we find them brought up for the first time in the briefs after submission, resulting in a re-opening of the case; we cannot see how it could possibly be contended that the damages could "be made certain by calculation", so as to permit plaintiffs to recover interest.

We might add that at the later hearings, which were allowed by the Court solely for the purpose of determining whether there were slats, their quantity and

value, plaintiffs offered, and the Court refused testimony which would have shown a quantity in excess of 8,000,000 board feet.

At various places we have italicized parts of quotes for convenience and emphasis solely in order to aid this Court. We have not previously noted this in each case, as this brief is necessarily replete with references.

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**CONCLUSION.**

It is respectfully submitted that the judgment of the trial Court be affirmed with costs.

Dated, San Francisco,  
August 22, 1949.

THORNTON & TAYLOR,  
*Attorneys for Appellees.*

No. 12276

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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HARMON M. WALEY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

---

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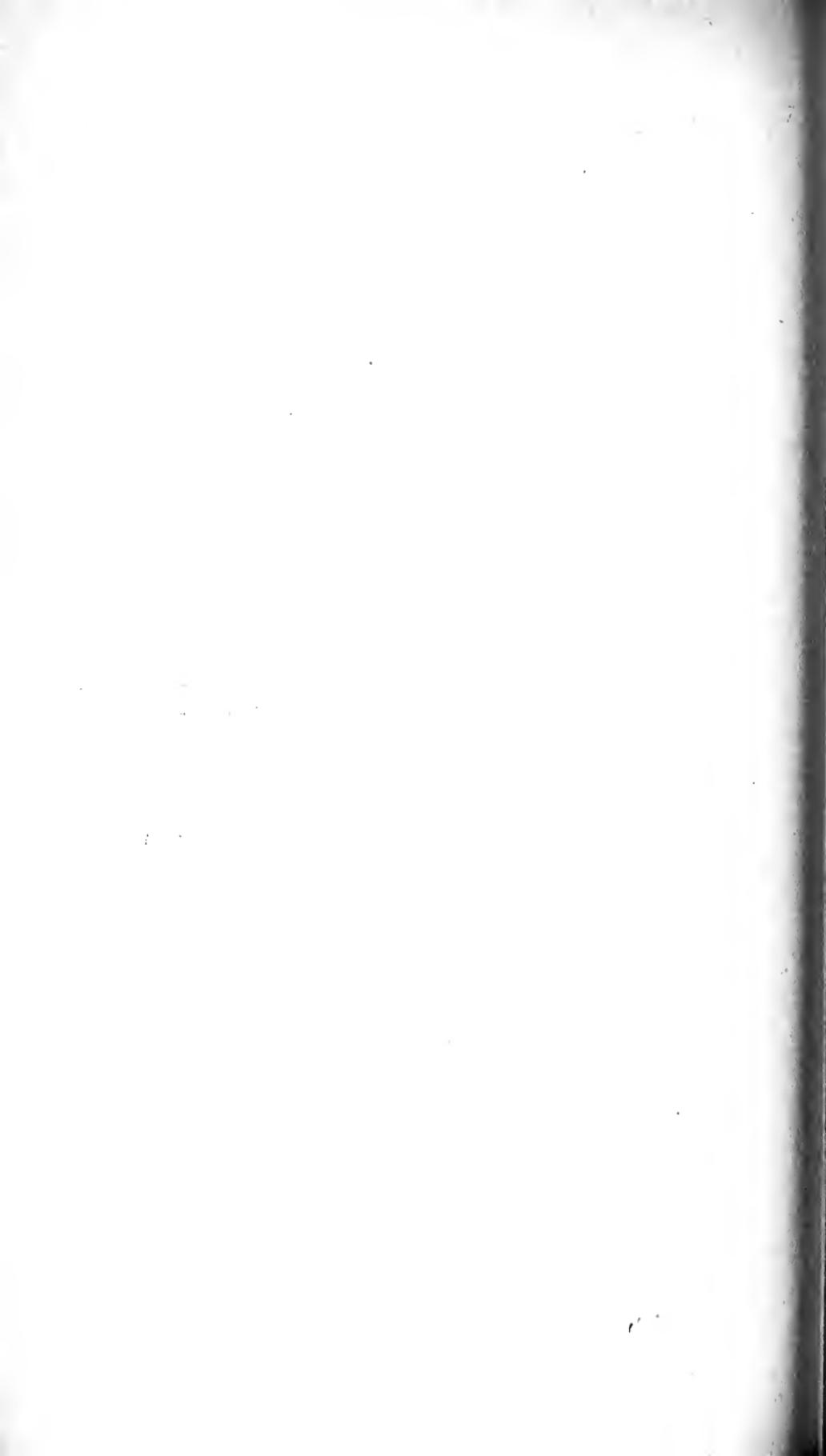
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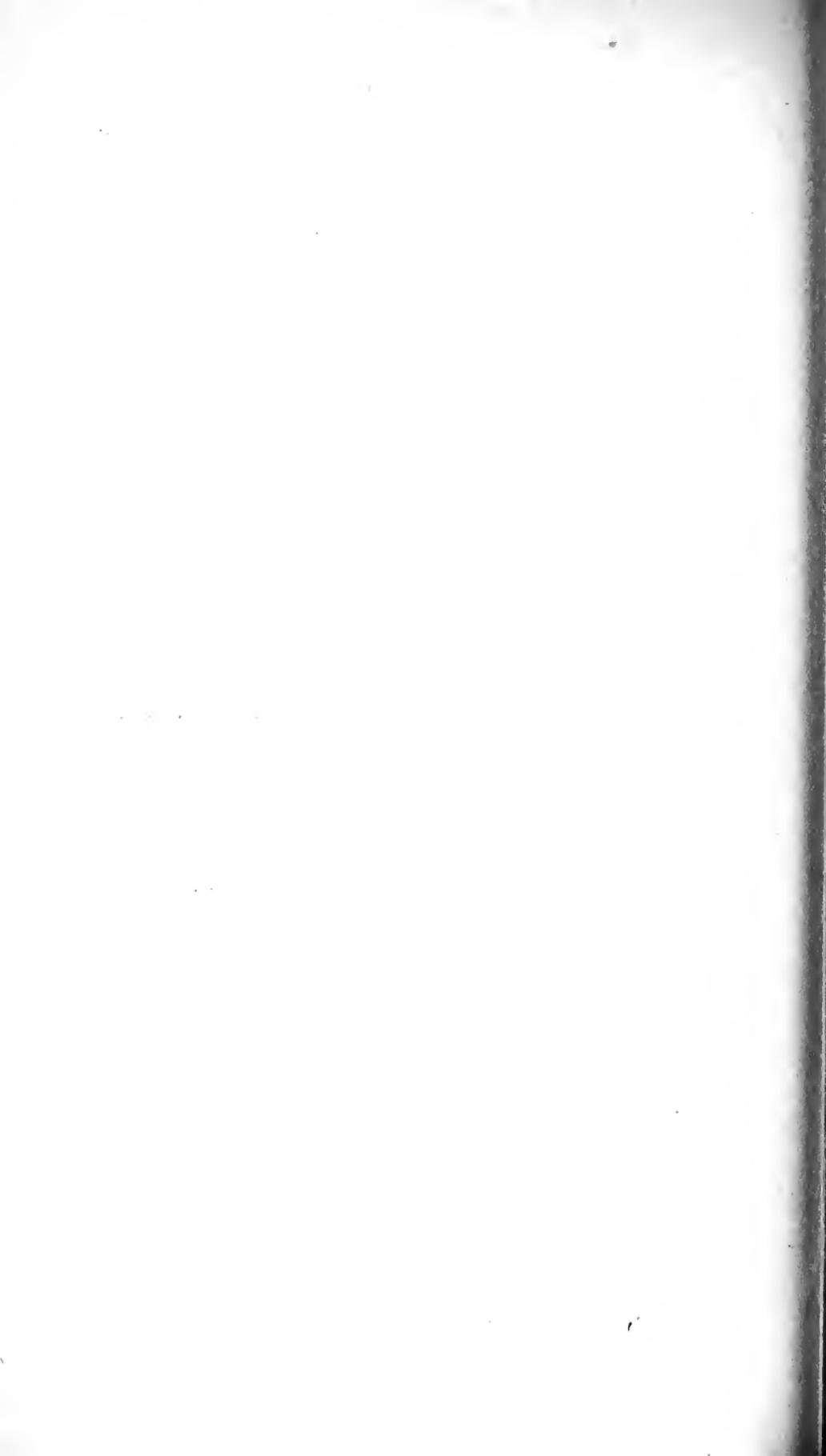
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HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

---

STATEMENT OF PLEADINGS AND FACTS

Appellant's motion to vacate, and set aside sentence, pursuant to New Title 28, U. S. Code, Sec. 2255, on the grounds that Count One of the indictment in cause No. 14,852, records of the U. S. District Court, Western District of Washington, South-

ern Division, did not allege that George Weyerhaeuser was a kidnapped person within the meaning of the statute at the time he was alleged to have been transported in interstate commerce by the defendants (including appellant), and therefore, the court was without jurisdiction to issue sentence, was filed in the said trial court and cause on February 21, 1949 (R. 7 - 9).

On April 18, 1949, the District Court, on its own motion, denied appellant's motion. (R. 10-11). From that final order, this appeal is taken. (R. 12-17).

The facts material to a determination of appellant's right to vacation of said judgment and sentence, as disclosed in the record, may be summarized as follows:

On June 19, 1935, an indictment containing two counts was returned against appellant and others in the Southern Division of the United States District Court for the Western District of Washington, which indictment in Count One charged the defendants, appellant here and others, with violation of the "Lindbergh Act". (Title 18 U.S.C.A. Section 408a), in that the defendants on or about May 27, 1935, did knowingly transport a person, George Weyerhaeuser, in interstate commerce from Tacoma, Washington, to Blanchard and Spirit Lake, State of Idaho,

who had therefore on or about May 24, 1935 been unlawfully seized, kidnapped, carried away, and held for ransom and reward by said defendants, and that said defendants failed to release said George Weyerhaeuser within seven (7) days after he had been so unlawfully seized, kidnapped, and carried away. (R. 1-4).

Thereafter, on June 21, 1935, the appellant, upon his conviction, was sentenced to 45 years on Count I and 2 years on Count II, sentences to run concurrently. Count II was the conspiracy count, and is in no way involved in these proceedings. (R. 5-6).

## QUESTIONS PRESENTED

### I.

Does Count One of the indictment fail to charge a federal offense?

### II.

What are the legal requirements in this proceeding?

- (a) As to mover's right to assistance of counsel; and
- (b) As to duty of court to make findings of fact and conclusions of law.

## ARGUMENT AND AUTHORITIES

1. Count One of the Indictment Sufficiently Charges an Offense Under the Law.

The statute involved in the original proceedings is Title 18, U.S.C.A. Sec. 408a commonly known as the "Lindbergh Act", which reads as follows:

*"Kidnaped Persons; transportation, etc., of persons unlawfully detained.*

Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: Provided, that the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive (June 22, 1932, C. 271, Sec. 1, 47 Stat. 326, as amended May 18, 1934, C. 301, 48 Stat. 781)".

Count One of the Indictment charged:

*"That \* \* \* Harmon Metz Waley \* \* \* and \* \* \* who are hereinafter referred to as defendants, on or about the twenty-seventh day of May,*

\* \* \* (A.D. 1935), at Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district then and there being, did then and there wilfully, unlawfully, knowingly and feloniously transport and cause to be transported, and aid and abet in transporting in interstate commerce a person, to-wit, George Weyerhaeuser, who had been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away without lawful authority and against his will and without his consent, and held for ransom and reward, that is to say, that *on or about the twenty-seventh of May, \* \* \* (A.D. 1935), at Tacoma, in the said Southern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, the said defendants, and each of them then and there being, did wilfully, unlawfully, knowingly, and feloniously transport and cause to be transported, and aid and abet in transporting by means of motor vehicle in interstate commerce from Tacoma, aforesaid, to Blanchard and Spirit Lake, State of Idaho, one George Weyerhaeuser of Tacoma, District and Division aforesaid, who had theretofore, to-wit, on or about the twenty-fourth day of May, \* \* \* (A.D. 1935), been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away, without lawful authority, and against his will and without his consent, and held for ransom and reward by said defendants, and that said defendants failed to release said George Weyerhaeuser within seven (7) days after he had been so unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away, as aforesaid, all of which the said defendants then and there well knew; contrary to the form of the statute in such case made and provided,*

*and against the peace and dignity of the United States of America.* (Italics ours)

Appellant, while conceding jurisdiction of the trial court over the person and the subject matter, as it decided in its order herein, does not concede that it follows that such jurisdiction gives to the court jurisdiction to decide contrary to law or issue a sentence thereupon. (Appellant's Brief — page 4).

It is the contention of appellant in his assignments of error "B" and "C" (R. 13-14), and as set forth in his brief, at pages 5 and 6, that the statute contemplates a simultaneous seizure and transportation, that is, a seizure occurring several days before the date of transportation is not included in the language of the statute. The acts, he contends, should coincide and the seizure with reference to the time of transportation should be eo instante.

In his motion to vacate (R. 8-9), however, appellant does not find fault with the prior date of seizure, but with the allegations of the indictment in that it appears to him that at the later date or when George Weyerhaeuser was supposed to have been transported in interstate commerce, it does not allege that he was so unlawfully, etc. held or kidnapped, or while so held that he was transported in interstate commerce.

In the manner of pleading we believe that ap-

pellant has a point. But this indictment makes up in quantity of words what it lacks in quality of expression. It alleges the date of seizure on or about May 24, by the defendants, and that they failed to release him within seven days after he had been so unlawfully seized, and it also alleges that he was transported, on or about May 27th, or during that period of seven days while they failed to release him after he had been so unlawfully seized. And certainly the expression "failed to release" should confirm the fact that he was then being "held".

It should not be overlooked, however, that it is well settled that defects in an indictment, not going to the jurisdiction of the court which pronounced sentence, may not be raised on habeas corpus. This, we contend, applies equally to the instant proceeding by way of motion.

### SEE

*Knight v. Hudspeth*, 112 F. (2d) 137;

*United States v. Dressler*, 112 F. (2d) 972;

*McNally v. Hill*, 69 F. (2d) 38, aff'd 293 U. S. 131;

*Creech v. Hudspeth*, 112 F. (2d) 603;

*Huntley v. Schilder*, 125 F. (2d) 250.

## II. *What Are the Legal Requirements In This Proceeding?*

### (a) As to Mover's Right to Assistance of Counsel.

Appellant contends that such motion is a part of the original proceedings wherein he was entitled to the Constitutional right in a criminal prosecution to have the assistance of counsel for his defense. (Appellant's Brief — page 3 — Assignment of Error A) (R. 13).

It is the contention of appellee that the motion herein provided raises the same question as would be raised by a Petition for Writ of Habeas Corpus and this proceeding is not a "criminal prosecution" as contemplated by Amendment VI to the Constitution of the United States, entitling the defendant to have assistance of counsel. *Brown v. Johnston*, 91 F. (2d) 370, cert. denied 302 U.S. 728. And the failure to have counsel after sentence is not in violation of this amendment. *Lovvorn v. Johnston*, 118 F. (2d) 704, cert. denied, 314 U.S. 607. Nor does the statute make any provision for assistance of counsel, but it does provide:

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." New Title 28, U. S. Code, Sec. 2255.

The foregoing provision would not imply that a criminal prosecution was involved.

The defendant, it must be contended, has had his day in court and is not now entitled to a second trial with all the rights and privileges accorded to an accused by this amendment, including the right to have the assistance of counsel for his defense in all criminal prosecutions.

In Paragraph IV of appellant's brief, pages 7 and 8 with reference to Assignment of Error D (R. 14) appellant himself brings his motion or petition within the realm of civil proceedings in contending allegations not denied must be accepted as true.

Appellee fails to find any allegations of fact in appellant's motion and does not feel bound by the undenied legal conclusions, and contentions set forth therein See *Quagon v. Biddle*, 5 F. (2d) 608.

(b) As to Duty of Court to Make Findings of Fact and Conclusions of Law.

In answer to Assignment of Error E (R. 14), it would not appear incumbent on the court denying a motion as herein to make any finding as to jurisdiction, and if it failed to so do, then, it would not follow that a valid judgment would thereby become void, as contended by appellant.

However, a reading of the court's order will dispel the foregoing illusion indulged by appellant. Under the statute, only in the case of a hearing is it required that the court determine the issues and make findings of fact and conclusions of law with respect thereto.

Upon the issue raised by appellant's last assignment, the opinion of the United States Court of Appeals for the Ninth Circuit in *Waley v. Johnston*, 139 F. (2d) 117, 121, as contained in the last paragraph, seems applicable, wherein it is announced:

"The indictment stated facts giving the trial court jurisdiction. Appellant pleaded guilty in open court in the presence of his attorney, thus conceding the facts alleged. The only question on this habeas corpus proceeding is whether the plea of guilty was freely and voluntarily entered. The court finds it was. There is ample evidence to sustain that finding."

### CONCLUSION

For the foregoing reasons, we contend the decision below should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,  
*United States Attorney*

GUY A. B. DOVELL,  
*Assistant United States Attorney*  
*Attorneys for Appellee.*

No. 12277

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

LOUISE K. GODFREY,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of  
Internal Revenue at San Francisco, California,

Appellee.

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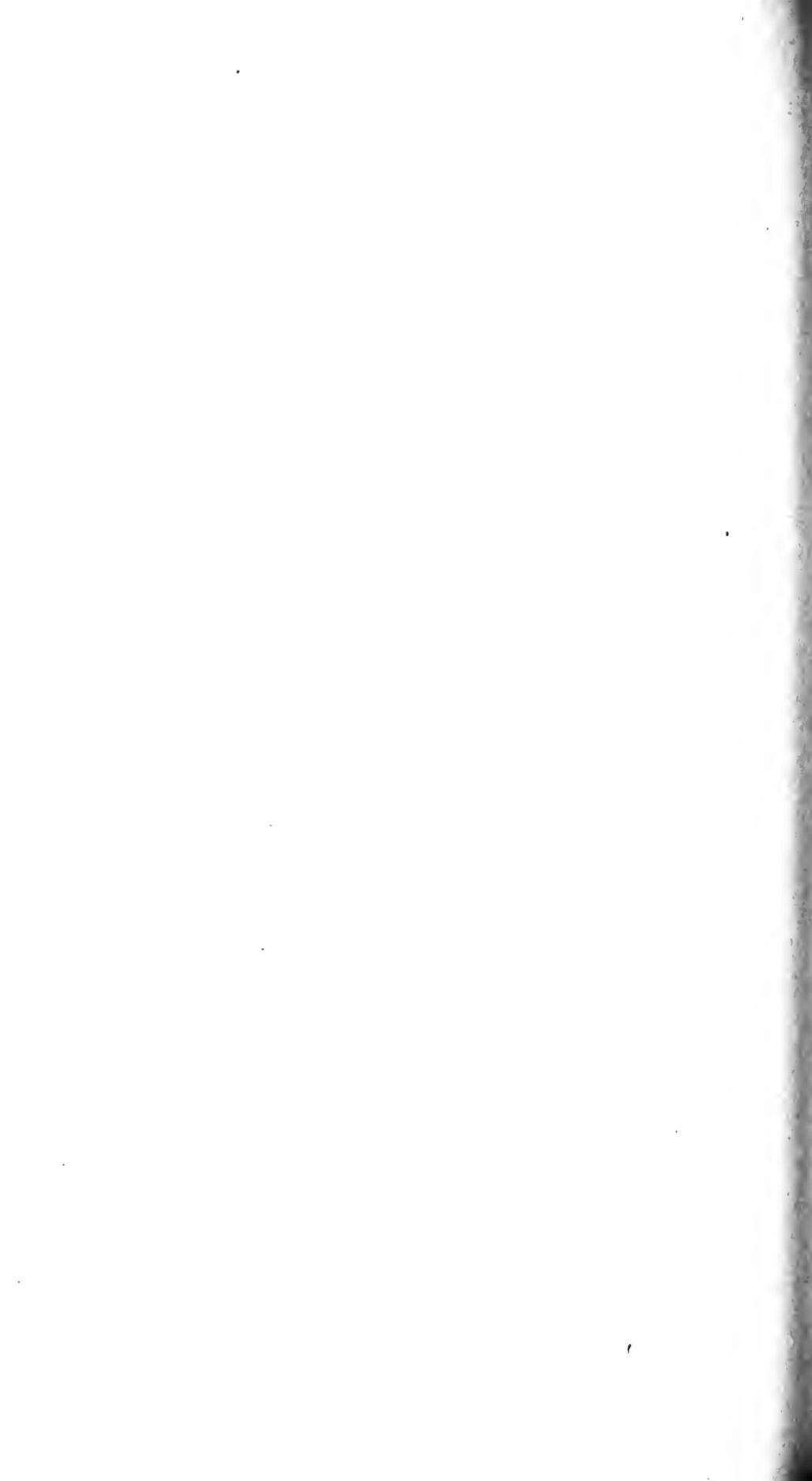
Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California  
Southern Division

AUG 26 1949

PAUL P. O'BRIEN,  
CLERK



No. 12277

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United States  
Court of Appeals  
For the Ninth Circuit.

---

LOUISE K. GODFREY,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of  
Internal Revenue at San Francisco, California,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California  
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorney for Plaintiff and Appellant.

FRANK J. HENNESSY, Esq.,

United States Attorney,  
Northern District of California,  
Post Office Building,  
San Francisco, California.

Attorney for Defendants and Appellees.

Trial before the Honorable Dal M. Lemmon, District Judge, sitting without a jury.

District Court of the United States, Northern  
District of California, Southern Division

27659G

LOUISE K. GODFREY,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and JAMES  
G. SMYTH, UNITED STATES COLLEC-  
TOR OF INTERNAL REVENUE at SAN  
FRANCISCO, CALIFORNIA,

Defendants.

COMPLAINT FOR REFUND OF TAXES

I.

Plaintiff is the widow, was the executrix under the last Will and Testament of William S. Godfrey, Jr., deceased, and his sole distributee under the Decree of Distribution in the matter of his estate.

Defendant James G. Smyth is, and at the time of the payments of Tax herein mentioned, was United States Collector of Internal Revenue at San Francisco, California.

II.

April 24, 1924, said William S. Godfrey, Jr., took out a policy of Life Insurance on his life in the New York Life Insurance Company, numbered 8 751 507, in the sum of \$15,000.00 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and thereupon on said date said New York

Life Insurance Co., a corporation incorporated in the State of New York, made, issued and delivered to him its policy of insurance in the said sum *or* \$15,000.00 payable to his executors, administrators, or assigns.

### III.

Thereafter, said William S. Godfrey, Jr., requested plaintiff, then his wife and now his widow, to consent to the erection of a trust agreement in the proceeds of said policy, and plaintiff agreed to do so on the sole condition and consideration said William S. Godfrey, Jr., would agree to and would keep up said policy and always keep it alive intact and in full force and effect, according to its terms, for the benefit and protection of plaintiff and her two minor children, and, in consideration of her said agreement, said William S. Godfrey, Jr., agreed that, if she would consent to said trust agreement and enter into the same, he would always keep up said policy intact for the benefit and protection of plaintiff and her said children.

### IV.

Thereafter, on June 5, 1924, said William S. Godfrey, Jr. (with the consent of plaintiff, and pursuant to his said agreement with plaintiff), entered into a trust agreement with said insurance company by the terms whereof said company agreed to receive, as trustee, the proceeds of said policy and agreed to pay one-half the proceeds and interest thereon, as per the terms of said agreement, to plaintiff, the first beneficiary, if living, in monthly

installments of \$50.00 each and, if plaintiff should die before the said insured, to pay the said one-half or proceeds to the daughter of plaintiff, but if both of said beneficiaries died, then the money should be paid to the executors, administrators of the last surviving beneficiary.

#### V.

And pursuant to his said agreement with the plaintiff the said William S. Godfrey, Jr., insured, made a similar contract with said insurance company, whereby he appointed said insurance company trustee of the other half of the proceeds of said policy, and said company agreed to receive, as trustee, from itself as insurer, one-half of the proceeds of said policy, and to pay one-half of the proceeds and the interest thereon to plaintiff, as beneficiary, in monthly installments of \$50.00 each, and, in the event of the death of plaintiff before the insured, to pay the said one-half or its proceeds to the son of plaintiff, and in the event of the death of both plaintiff and her said son, to pay one-half of the proceeds to the executors or administrators of the last surviving beneficiary.

#### VI.

Said insured always did keep said policy alive, intact and paid up for the protection of plaintiff and her children and paid the annual premiums thereon until he became disabled in 1937, after which the premiums were, by the terms of the policy, waived.

VII.

December 21, 1929, the said William S. Godfrey, Jr., as insured, took out a further policy of life insurance with said New York Life Ins. Co. numbered 10-899-287 in the sum of \$25,000.00, payable to the executors, administrators, or assigns of the insured or his duly designated beneficiary, for an annual premium which said insured agreed to pay.

On December 21, 1929, pursuant to said contract, said insurance company, made, executed and delivered to William S. Godfrey, Jr., said insured, its policy of life insurance on the life of said William S. Godfrey, Jr., in said sum of \$25,000.00 payable to the executors, administrators, or assigns, or his duly designated beneficiary.

VIII.

On February 24, 1930, said insured requested plaintiff to consent to his entering into a trust agreement with the said insurance company in the proceeds of said policy, and plaintiff contended that he might enter into said trust agreement on the sole condition and consideration that he would agree always to keep and maintain said policy intact for the benefit and protection of plaintiff and her two children, and said insured then and there agreed with plaintiff that, in consideration of her consenting to erection of said trust agreement, he would always keep said policy up intact for the benefit and protection of the plaintiff and her said two children.

## IX.

Thereafter on said date, said insured did enter into such trust agreement with said insurance company by the terms whereof the insurance company agreed to receive one-half of the proceeds of said policy as trustee and to pay the funds so held and the interest credited thereon, to plaintiff, as first beneficiary, at the rate of \$100.00 per month, and in case of the death of plaintiff to pay the balance of said fund, in like manner, to the daughter of plaintiff, and, in the event of the death of both plaintiff and her said daughter, to the executors or administrators of the last surviving beneficiary.

## X.

And in like manner, on said date, said insured and said insurance company entered into a similar agreement as to the other half of the proceeds of said policy, whereby said insurance company agreed to receive the other half of the proceeds of said insurance as trustee, and to pay the same over to plaintiff, as beneficiary, in monthly installments of \$100.00 and in the event of plaintiff's death prior to the insured to pay to said fund or any balance thereof, to the son of plaintiff, if living, and if both plaintiff and said son die, then to the executors or administrators of the last surviving beneficiary.

All of said agreements operated to transfer to plaintiff and her children the whole beneficial interest in said policies.

XI.

Pursuant to his said agreement, said insured kept up and maintained said policy intact and in full force and effect, paying all premiums thereon, until he became disabled in 1937, when, pursuant to the terms of said policy, said premiums were thereafter waived.

XII.

In 1937, William S. Godfrey, Jr., became disabled and plaintiff took out letters of Guardianship upon his person and estate. Thereafter, no premiums were paid, and under the terms of said contract no premiums should be paid. Said disability continued until the death of said insured.

XIII.

November 6, 1944, William S. Godfrey, Jr., the said insured, died, testate. Thereafter such proceedings were had in the matter of his estate, that his will was admitted to probate and plaintiff was appointed executrix thereof, duly qualified as such, and ever since and up to Final Distribution and her discharge, remained the duly appointed, qualified, and acting executrix of his said last will.

By the terms of his last will, said insured left all his property, of every kind and character to plaintiff, and pursuant thereto all of said estate was duly distributed to plaintiff by Decree of Final Distribution.

XIV.

Plaintiff, as executrix of aforesaid, duly returned to the said Collector of Internal Revenue of the

United States of America the estate tax return on the estate of said insured and said return showed due to the U. S. Government by way of Estate Tax the sum of \$10,786.15, and on June 13, 1945, plaintiff, as executrix, paid said sum to the said James G. Smyth, Collector of Internal Revenue of the United States of America. Thereafter, such proceedings were had in the matter of said estate, that on July 30, 1945, the Superior Court of California, for the City and County of San Francisco, made its Decree of Settlement of First and Final Account and of Final Distribution in the matter of the estate of said insured, by the terms whereof the entire estate of said insured was distributed to plaintiff and plaintiff, ever since has been, and now is, the sole owner thereof, including the claim for refund of Estate Tax here sued for.

Thereafter, the said court, the court in which the probate of said estate depended, made its order discharging plaintiff as executrix of said last will of said insured, and said proceedings in the matter of said estate came to an end.

#### XV.

On November 14, 1945, F. M. Harless, United States Internal Revenue Agent in charge in San Francisco, California, made to plaintiff his report of examination of the estate tax return of the said estate, indicating a deficiency \$4,290.76 in said estate taxes, and fixing the claimed correct tax liability at \$15,076.91 and on said date, plaintiff received from said Collector of Internal Revenue a notice of defi-

ciency in the sum of \$4,290.76, and on November 27, 1945, plaintiff forthwith paid to said James G. Smyth, said Collector of Internal Revenue, the amount of said deficiency, under protest, first, because 50% of the community property, to wit, the entire estate, should have been deducted; secondly, as to the \$40,000.00 of insurance, the said policy 8-751-507 for \$15,000.00 was covered by the said two trust agreements, and said policy No. 10-899-287, for \$25,000.00 was likewise covered by said trust agreement.

#### XVI.

Immediately after payment of said deficiency, plaintiff filed with said Collector of Internal Revenue her claim for refund as to said taxes, and said claim for refund was referred to the Auditing Department and the Technical Staff of the Internal Revenue Department of the United States, and on August 26, 1947, said claim for refund was denied and rejected in its entirety.

#### XVII.

By reason of wrongful inclusion of the proceeds of said two insurance policies, the amount of the correct tax liability of said estate was not the sum of \$15,076.91 as stated in the said report of said Collector, and there was no deficiency due said Collector, but the correct amount of said tax was only \$4988.01 and the sum paid said collector in excess of the proper amount of said tax was the sum of \$10,088.90, and there is now due, owing, and unpaid from the United States of America to plaintiff the

said sum of \$10,088.90, no part of which has been paid.

Wherefore, plaintiff, waiving the excess of said sum of \$10,088.90 over the sum of \$10,000.00, to wit, the sum of \$88.90, and interest on said excess payments, prays judgment against defendant and each of them, for the said sum of \$10,000 for refund of her said illegally collected taxes and for her costs of suit.

/s/ I. M. PECKHAM,  
Attorney for Plaintiff.

United States of America,  
State of California,  
Northern District of California—ss.

Louise K. Godfrey, being duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, excepting as to the matters therein stated on her information and belief and as to those matters that she believes it to be true.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 16th day of September, 1947.

[Seal] /s/ LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Sept. 17, 1947.

[Title of District Court and Cause.]

ORDER AMENDING COMPLAINT ON ITS  
FACE

The plaintiff, having dismissed the above-entitled action as to defendant United States of America, and the plaintiff having in her original Complaint waived the excess of the claimed over-payment and interest thereon in excess of \$10,000.00, but solely for the purpose of retaining jurisdiction of said Complaint in this Court, and there now being no reason therefor, on application of the plaintiff,

It Is Ordered that the Complaint on file in the above-entitled action be and it hereby is amended so that the prayer for relief may read:

“Wherefore, plaintiff prays judgment against defendant James G. Smyth, United States Collector of Internal Revenue at San Francisco, California, for the said sum of \$10,088.90 for refund of her said illegally collected taxes, for interest on said excess payments, for her costs of suit, and for such other and further relief as to the court seems meet.”

Done in Open Court this 25th day of November, 1947.

/s/ LOUIS E. GOODMAN,

Judge of Said District Court.

[Endorsed]: Filed Nov. 25, 1947.

[Title of District Court and Cause.]

DISMISSAL AS TO DEFENDANT UNITED  
STATES OF AMERICA

To the Clerk of the above-entitled Court:

The above-entitled action is hereby dismissed as to defendant United States of America, and you are instructed to enter such dismissal of record and this will be your authority for so doing.

/s/ I. M. PECKHAM,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 25, 1947.

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In the District Court of the United States for the  
Northern District of California, Southern Di-  
vision

Civil Action No. 27659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, UNITED STATES COL-  
LECTOR OF INTERNAL REVENUE, at  
SAN FRANCISCO, CALIFORNIA,

Defendant.

ANSWER

The defendant, James G. Smyth, through his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, answering the complaint:

I.

Admits the allegations of paragraph numbered I thereof.

II.

Admits that on April 24, 1924, William S. Godfrey, Jr., took out a policy of life insurance on his life with the New York Life Insurance Company, numbered 8751507, in the sum of \$15,000 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and that thereupon the said Life Insurance Company issued and delivered to him its policy of insurance in the sum of \$15,000, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered II thereof, the defendant denies the same.

III.

For lack of any information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph numbered III thereof, the defendant denies the same.

IV.

Answering the allegations of paragraphs numbered IV and V thereof, the defendant admits that on June 5, 1924, William S. Godfrey, Jr., with the consent of the plaintiff, entered into so-called trust agreements whose terms speak for themselves, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remain-

ing allegations of said paragraphs numbered IV and V, the defendant denies the same.

V.

Admits that the insured always did keep the said policy alive and paid up until he became disabled in 1937 after which the premiums were, by the terms of the policy, waived, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered VI thereof, the defendant denies the same.

VI.

Admits the allegations of paragraph numbered VII thereof.

VII.

For lack of any information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph numbered VIII thereof, the defendant denies the same.

VIII.

Answering the allegations of paragraphs numbered IX and X thereof, the defendant admits that the said insured entered into so-called trust agreements whose terms speak for themselves with the said Insurance Company but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraphs numbered IX and X thereof, the defendant denies the same.

IX.

Admits that the said insured kept up and maintained said policy numbered 10899287 in full force and effect, paying all premiums thereof, until he became disabled in 1937, when, pursuant to the terms of said policy, said premiums were thereafter waived, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XI thereof, the defendant denies the same.

X.

Defendant admits the allegations of paragraph numbered XII thereof.

XI.

Defendant admits the first sentence of paragraph numbered XIII thereof, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of said paragraph numbered XIII thereof, the defendant denies the same.

XII.

Defendant admits the first sentence of paragraph numbered XIV thereof, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XIV thereof, the defendant denies the same.

XIII.

Admits that F. M. Harless, United States Internal Revenue Agent in Charge in San Francisco, California, made to the plaintiff his report of the

examination of the estate tax return of the said estate, which report indicated a deficiency of \$4,290.76 in estate taxes and fixed a claim correct tax liability of \$15,076.91, and that on November 27, 1945, the plaintiff paid the said deficiency of \$4,290.76 to the defendant under protest, but for lack of any information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph numbered XV thereof, the defendant denies the same.

XIV.

Admits the allegations of paragraph numbered XVI thereof.

XV.

Denies the allegations of paragraph numbered XVII thereof.

Wherefore, the defendant prays for judgment dismissing the complaint together with the costs and disbursements of this action.

/s/ FRANK J. HENNESSY,  
United States Attorney.

[Endorsed]: Filed Dec. 16, 1947.

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[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To the Clerk of the above-entitled court and to defendant above-named and Hon. Frank J. Hennessy, United States Attorney, as his attorney:

Leave of the court first had and obtained, plaintiff files this demand for a jury trial of the issues in the above-entitled action.

/s/ I. M. PECKHAM,  
Attorney for Plaintiff.

Copy received January 12, 1948.

/s/ FRANK J. HENNESSY,  
United States Attorney.

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District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman,  
District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR TRIAL BY  
JURY

This case came on regularly this day for hearing on motion for trial by jury. After hearing Messrs. Peckham and Licking, attorneys herein, it is Ordered that said motion be denied.

[Endorsed]: Filed Jan. 12, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled action came on regularly for trial before the court, sitting without a jury, at San Francisco, California, the Honorable Dal M. Lemmon, Judge, presiding, the plaintiff appearing by I. M. Peckham, Esq., her attorney, and the defendant James G. Smyth, appearing by Hon. Frank J. Hennessy, United States Attorney for the Northern District of California, and Honorable W. E. Licking, Assistant United States Attorney for said District, his attorneys, and evidence both oral and documentary was introduced and briefs filed on behalf of the parties, and the court having considered the evidence introduced and the briefs submitted therefrom, makes the following:

Findings of Fact

I.

Plaintiff is the widow, was the executrix under the last Will and Testament of William S. Godfrey, Jr., deceased, and his sole distributee under the Decree of Distribution in the matter of his estate.

Defendant James G. Smyth is, and at the time of the payments of Tax herein mentioned was United States Collector of Internal Revenue at San Francisco, California.

## II.

April 24, 1924, said William S. Godfrey, Jr., took out a policy of life insurance on his life in the New York Life Insurance Company, numbered 8 751 507, in the sum of \$15,000 in favor of his executors, administrators, or assigns or his duly designated beneficiary for an annual premium which he agreed to pay, and thereupon on said date said New York Life Insurance Co., a corporation, incorporated in the state of New York, made, issued and delivered to him its policy of insurance in the said sum of \$15,000 payable to his executors, administrators, or assigns.

## III.

Referring to the allegations of paragraph III of plaintiff's complaint, it is true that subsequent to the issuance of the policy No 8 751 507 on April 24, 1924, decedent William S. Godfrey, Jr., requested plaintiff, then his wife and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy mentioned in paragraph IV of plaintiff's complaint, and plaintiff stated that she would do so and said decedent, William S. Godfrey, Jr., stated that he would always keep up said policy intact for the benefit and protection of plaintiff and her children. That at and before the signing by her of the consent to the trust agreement mentioned in plaintiff's complaint, Mr. Godfrey stated to Mrs. Godfrey that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements.

That at the time said discussion took place, the greatest bond of affection and confidence existed between the insured and his wife. By the creation of the trust, the insured was seeking to make the best possible provision for his wife and his children. The trust had the effect of making the wife and children beneficiaries and of conserving the funds all for their benefit. But the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policy was destroyed.

#### IV.

Thereafter, on June 5, 1924, said William S. Godfrey, Jr., entered into a trust agreement with said insurance company by the terms whereof said company agreed to receive, as trustee, the proceeds of said policy and agreed to pay one-half the proceeds and interest thereon, to plaintiff, the first beneficiary, if living, in monthly installments of \$50 each and, if plaintiff should die before the said insured, to pay the said one-half or proceeds to the daughter of plaintiff, but if both of said beneficiaries died,

then the money should be paid to the executors or administrators of the last surviving beneficiary.

## V.

The said William S. Godfrey, Jr., insured, made a similar contract with said insurance company, whereby he appointed said insurance company trustee of the other half of the proceeds of said policy, and said company agreed to receive, as trustee, from itself as insurer, one-half of the proceeds of said policy, and to pay one-half of the proceeds and the interest thereon to plaintiff, as beneficiary, in monthly installments of \$50 each, and, in the event of the death of plaintiff before the insured, to pay the said one-half or its proceeds to the son of plaintiff, and in the event of the death of both plaintiff and her said son, to pay one-half of the proceeds to the executors or administrators of the last surviving beneficiary.

## VI.

Said insured always did keep said policy alive, intact and paid up for the protection of plaintiff and her children and paid the annual premiums thereon until he became disabled in 1937, after which the premiums were, by the terms of the policy, waived.

## VII.

December 21, 1929, the said William S. Godfrey, Jr., as insured, took out a further policy of life insurance with said New York Life Ins. Co. numbered 10 899 287 in the sum of \$25,000, payable

to the executors, administrators or assigns of the insured or his duly designated beneficiary, for an annual premium which said insured agreed to pay.

On December 21, 1929, pursuant to said contract, said insurance company made, executed and delivered to William S. Godfrey, Jr., said insured, its policy of life insurance on the life of said William S. Godfrey, Jr., in said sum of \$25,000 payable to the executors, administrators, or assigns, or his duly designated beneficiary.

### VIII.

Referring to the allegations of paragraph VIII of said complaint, it is true that on February 24, 1930, insured requested plaintiff to consent to his entering into the trust agreement with the insurance company in the proceeds of policy No. 10 899 287 and that plaintiff stated that he might enter into such trust agreement and insured stated to plaintiff that he would keep up said policy intact and in full force and effect for the benefit and protection of plaintiff and her children, and said insured then and there stated to plaintiff that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements, but the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or prom-

ise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policies was destroyed.

### IX.

Thereafter on said date, said insured did enter into such trust agreement with said insurance company by the terms whereof the insurance company agreed to receive one-half of the proceeds of said policy as trustee and to pay the funds so held and the interest credited thereon, to plaintiff, as first beneficiary, at the rate of \$100 per month, and in case of the death of plaintiff to pay the balance of said fund, in like manner, to the daughter of plaintiff, and, in the event of the death of both plaintiff and her said daughter, to the executors or administrators of the last surviving beneficiary.

### X.

And in like manner, on said date, said insured and said insurance company entered into a similar agreement as to the other half of the proceeds of said policy, whereby said insurance company agreed to receive the other half of the proceeds of said insurance as trustee, and to pay the same over to plaintiff, as beneficiary, in monthly installments of \$100 and in the event of plaintiff's death prior to the insured to pay the said fund or any balance thereof, to the son of plaintiff, if living, and if both plaintiff and said son die, then to the execu-

tors or administrators of the last surviving beneficiary.

### XI.

Said insured kept up and maintained said policy intact and in full force and effect, paying all premiums thereon, until he became disabled in 1937, when pursuant to the terms of said policy, said premiums were thereafter waived.

### XII.

In 1937, William S. Godfrey, Jr., became disabled and plaintiff took out letters of Guardianship upon his person and estate. Thereafter, no premiums were paid, and under the terms of said contract no premiums should be paid. Said disability continued until the death of said deceased.

### XIII.

November 6, 1944, William S. Godfrey, Jr., the said insured, died, testate. Thereafter such proceedings were had in the matter of his estate, that his will was admitted to probate and plaintiff was appointed executrix thereof, duly qualified as such, and ever since and up to Final Distribution and her discharge, remained the duly appointed, qualified and acting executrix of his said last Will.

By the terms of his last Will, said insured left all his property, of every kind and character to plaintiff, and pursuant thereto all of said estate was duly distributed to plaintiff by Decree of Final Distribution.

## XIV.

Plaintiff, as executrix of aforesaid, returned to the said Collector of Internal Revenue of the United States of America the estate tax return on the estate of said insured and said return showed due to the U. S. Government by way of Estate Tax the sum of \$10,786.15, and on June 13, 1945, plaintiff, as executrix, paid said sum to the said James G. Smyth, Collector of Internal Revenue of the United States of America. Thereafter, such proceeding were had in the matter of said estate, that on July 30, 1945, the Superior Court of California, for the City and County of San Francisco, made its Decree of Settlement of First and Final Account and of Final Distribution in the matter of the estate of said insured, by the terms whereof the entire estate of said insured was distributed to plaintiff and plaintiff ever since has been, and now is, the sole owner thereof, including the claim for refund of Estate Tax here sued for.

Thereafter, the said court, the court in which the probate of said estate depended, made its order discharging plaintiff as executrix of said last Will of said insured, and said proceedings in the matter of said estate came to an end.

## XV.

On November 14, 1945, F. M. Harless, United States Internal Revenue Agent in charge in San Francisco, California, made to plaintiff his report of examination of the estate tax return of the said estate, indicating a deficiency of \$4,290.76 in said

estate taxes, and fixing the claimed correct tax liability at \$15,076.91 and on said date, plaintiff received from said Collector of Internal Revenue a notice of deficiency in the sum of \$4,290.76, and on November 27, 1945, plaintiff forthwith paid to said James G. Smyth, said Collector of Internal Revenue, the amount of said deficiency, under protest, first, because 50% of the community property, to wit, the entire estate, should have been deducted; secondly, as to the \$40,000 of insurance, the said policy 8 751 507 for \$15,000 was covered by the said two trust agreements, and said policy No. 10 899 287 for \$25,000 was likewise covered by said trust agreement.

#### XVI.

Immediately after payment of said deficiency, plaintiff filed with said Collector of Internal Revenue her claim for refund as to said taxes, and said claim for refund was referred to the Auditing Department and the Technical Staff of the Internal Revenue Department of the United States, and on August 26, 1947, said claim for refund was denied and rejected in its entirety.

#### XVII.

It is not true that by reason of inclusion of the proceeds of said two insurance policies the amount of the correct tax liability of said estate was not the sum of \$15,067.91, as stated in the report of the defendant collector; it is not true that there was no deficiency due said collector or that the total

amount of said tax was only \$4988.01, or that the sum paid such collector is in excess of the proper amount of said tax was or is the sum of \$10,088.90, or that there is now due, owing or unpaid from the United States of America to plaintiff the said sum of \$10,088.90, or any part thereof.

### XVIII.

It is true that said policy No. 8751507 on the life of the insured provided that the insured might change the beneficiaries upon written notice to the home office of the insurer. In the event all beneficiaries should predecease the insured, the interest of the beneficiary was to vest in the insured.

Each trust in one-half the proceeds of said policy provides that the trustee should receive from itself as insurer one-half of the proceeds of said policy in case it should become a claim because of the insured's death. Each trust named plaintiff as first beneficiary of the trust, and in the event of her death, the proceeds of the trust were to be paid in equal parts to the two children of insured and plaintiff. It is true that each trust provided that it should become null and void if (a) the grantor revoked the appointment by written notice to the trustee; (b) the grantor should survive both beneficiaries; (c) if any change were made in the beneficiary or manner of payment of the proceeds of said policy; (d) if the policy should be surrendered for its cash surrender value; (e) if the net sum available under the policy at the time of the insured's

death should be less than; and (f) if the insured should assign the policy.

### XIX.

As to policy No. 10 899 287, the policy did not provide on its face that insured might change the beneficiary in the manner provided in the policy. As to change of beneficiary Policy No. 10 899 287 reads:

New York Life Insurance Company, a mutual company, agrees to pay to the executors, administrators or assigns of the insured, or to the duly designated beneficiary (with right on the part of the insured to change beneficiary in the manner provided herein). Twenty-five thousand (\$25,000.00) dollars (the face of this policy), etc.

The only other reference to change of beneficiary in the policy was a ruled space at the end of its schedules labeled:

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#### REGISTER OF CHANGE OF BENEFICIARY

NOTE—No change of beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office.

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Date of Request	Beneficiary	Indorsed by
On the 24th day of February, 1930, the New York Life Insurance Company was appointed trustee as per conditions of trust agreements (2) attached hereto.		John C. McCarthy, Vice President

### XX.

It is true that plaintiff married decedent insured September 4, 1916. They had two children, both still living. Plaintiff and insured resided and made

their home in this district from their marriage to the death of insured November 6, 1944. All premiums of said policies were paid with the community earnings of the insured and plaintiff.

### Conclusions of Law

From the foregoing Findings of Fact, the court concludes as a matter of law:

#### I.

That decedent insured retained the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies 8 751 507 and 10 899 287 or the proceeds thereof.

#### II.

The insured, as manager of the community of himself and plaintiff, at his death possessed incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code as amended by Section 404 of the Revenue Act of 1942.

#### III.

That defendant as collector and the Commissioner of Internal Revenue properly included \$40,000.00, representing the proceeds of said policies, in the estate of said insured for Federal Estate Tax purposes.

#### IV.

Plaintiff did not over-pay the Federal Estate Taxes on the estate of said insured.

## V.

There was no over-payment of the Federal Estate Tax on the Estate of William S. Godfrey, Jr., deceased.

## VI.

Defendant is entitled to judgment against plaintiff for his costs to be taxed.

Let judgment be entered accordingly.

Dated: January 21st, 1949.

/s/ DAL M. LEMMON,  
U. S. District Judge.

[Endorsed]: Filed Jan. 21, 1949.

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District Court of the United States, Northern  
District of California, Southern Division

No. 27,659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, UNITED STATES COL-  
LECTOR OF INTERNAL REVENUE, at  
SAN FRANCISCO, CALIFORNIA,

Defendant.

JUDGMENT

The above-entitled action came on for trial before the Court, sitting without a jury at San Francisco,

California, the Honorable Dal M. Lemmon, Judge, presiding, and the plaintiff appearing by I. M. Peckham, her attorney, and the defendant, James G. Smyth, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and W. E. Licking, Assistant United States Attorney for said District, his attorneys, and evidence, both oral and documentary, was introduced by and briefs filed on behalf of the respective parties and the Court having considered the evidence introduced and the briefs submitted and the Court having made its Findings of Fact and Conclusions of Law herein, it is hereby ordered, adjudged and decreed that the plaintiff take nothing by this action and that the defendant have judgment against the plaintiff for his costs to be taxed in the sum of \$

Dated: This 21st day of January, 194..

/s/ DAL M. LEMMON,  
District Judge.

Approved as to form as provided in Rule 5(d).

/s/ I. M. PECKHAM,  
Attorney for Plaintiff.

Entered in Civil Docket Jan. 24, 1949.

Lodged 12-1-48.

[Endorsed]: Filed Jan. 21, 1949.

District Court of the United States, Northern  
District of California, Southern Division

No. 27,659-G

GODFREY,

vs.

SMYTH, U. S. COLL. INTERNAL REVENUE.

NOTICE

To: I. M. Peekham, Esq., 405 Montgomery St.,  
Room 1124, San Francisco, Calif.; Frank J.  
Hennessy, Esq., P. O. Building, San Francisco,  
Calif.

You Are Hereby Notified that on January 24,  
1949, a Decree Judgment was entered of record in  
this office in the above-entitled case.

C. W. CALBREATH,

Clerk, U. S. District Court.

fj

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[Title of District Court and Cause.]

Notice of Motion and Motion to Amend Finding  
and Judgment or, in the Alternative, to Va-  
cate the Decision and Judgment and for a New  
Trial

To the Honorable the above-entitled Court, the  
Clerk thereof, to Honorable James G. Smyth,  
United States Collector of Internal Revenue,  
Defendant, and to Honorable Frank J. Hen-  
nessy, U. S. Attorney, Attorney for Defend-  
ant:

Notice is given that on February 14, 1949, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the Court Room of the above-entitled Court, in the Post Office Building in the City and County of San Francisco, State and Northern District of California, plaintiff will, and hereby does, move the above-entitled court for its order, in the alternative, setting aside Findings Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and to vacate the judgment made and entered in said cause on January 24, 1949, and, to make in lieu thereof, the annexed Findings Number III, VIII, XA and XVII and Conclusions of Law Number I to VI, inclusive, and to enter in lieu of said judgment an opposite and contrary judgment.

Forms of said Order, Findings, Conclusions of Law, and Judgment are hereunto annexed and served and filed herewith.

Or, in the alternative, to vacate and set aside said Findings of Fact and Conclusions of Law and Judgment and to grant to plaintiff a new trial of the issues embraced within said Findings. A copy of our proposed order granting new trial is hereunto annexed and served and filed herewith.

Said motions will be made on the ground that said Findings of Fact and Conclusions of Law and Judgment made herein are:

1. The decision is contrary to the law in the case. .

2. The decision is contrary to the evidence in the case.

3. The decision and judgment are contrary to the law and the evidence in the case.

4. The evidence is insufficient to support the decision.

5. The evidence is insufficient to support the decision and judgment.

6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary Findings, Conclusions and Judgment.

7. The decision and judgment are contrary to and against law.

8. The evidence shows that a decision and judgment should have been rendered in favor of plaintiff, and that the decision and judgment, as rendered, are contrary to law, and will be based on this notice, the minutes of the court, the record of the evidence herein, on the said Findings, Conclusions and Judgment made herein, and on all the records, papers, pleadings and files in the above-entitled action.

/s/ I. M. PECKHAM,  
Attorney for Plaintiff.

Copy received February 1st, 1949.

FRANK J. HENNESSY,  
U. S. Attorney.

By /s/ E. ELMER COLLETT,  
Attorney for Defendant.

[Title of District Court and Cause.]

ORDER VACATING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND JUDG-  
MENT AND AMENDING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
JUDGMENT

Plaintiff Louise K. Godfrey, having duly served and filed her motion to amend Findings of Fact and Judgment herein, and said motion having come on duly and regularly to be heard, both parties appearing on said hearing, and the matters having been heard and submitted to the court, and the court having considered the same, and being advised in the premises;

It Is Ordered, Adjudged and Decreed that Findings of Fact Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and the judgment made and entered in this cause on January 24, 1949, be and they hereby are vacated and set aside and in lieu thereof the court makes the Findings of Fact and Conclusions of Law in the form hereunto annexed, and directs the entry of an opposite and contrary judgment in accordance with the form of judgment hereunto annexed.

.....,

Judge of the U. S. District  
Court.

[Title of District Court and Cause.]

AMENDMENT TO FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The motion of plaintiff to amend the Findings of Fact and Conclusions of Law and Judgment in the above-entitled action, having come on regularly for hearing, plaintiff and defendant appearing by their respective counsel, said motion having been granted, the court now finds in lieu of Findings Number III, VIII and XVII heretofore made, the following Findings of Fact:

III.

Subsequent to the issuance of policy 8 751 507 on April 24, 1924, said William S. Godfrey, Jr., decedent and insured, requested the plaintiff, then his wife and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy, and plaintiff agreed to do so on the sole condition and consideration that William S. Godfrey, Jr., would agree to and would keep up said policy and always keep it alive, intact and in full force and effect according to its terms for the benefit and protection of plaintiff and her two minor children, and in connection with her said agreement said William S. Godfrey, Jr., agreed that if she would consent to said trust agreement and enter into the same, he would always keep up said policy intact for the benefit and protection of plaintiff and her children.

## VIII.

It is true that on February 24, 1930, said insured requested plaintiff to consent to his entering into a trust agreement with said insurance company in the proceeds of said policy No. 10 899 287, and plaintiff thereupon consented that he might enter into said trust agreement on the sole condition and consideration that he would agree always to keep and maintain said policy intact for the benefit and protection of plaintiff and her two children, and said insured then and there agreed with plaintiff that in consideration of her consenting to the erection of said trust agreement, he would always keep said policy up, and intact for the benefit and protection of plaintiff and her said two children.

## XA.

The trust agreements of February 24, 1930, covering said Policies No. 8 751 507 in the sum of \$15,000.00 and No. 10 899 287 in the sum of \$25,000.00 operated to transfer to plaintiff and her children the whole beneficial interest in said policies No. 8 751 507 and No. 10 899 287.

## XVII.

By reason of the wrongful inclusion of the proceeds of said two insurance policies, the amount of the correct tax liability of said estate was not the sum of \$15,076.91 as stated in the said report of said Collector and there was no deficiency due said Collector, but the correct amount of said tax was only \$4988.01 and the sums paid said Collector in excess

of the proper amount of said tax was the sum of \$10,088.91, or thereabouts, and there is now due, owing and unpaid from the United States of America to Plaintiff the said sum of \$10,088.90, no part of which has been paid.

### Conclusions of Law

From the foregoing Findings of Fact as from all facts previously found, the court concludes as a matter of law:

#### I.

That decedent insured did not retain the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies No. 8 751 507 and 10 899 287 or the proceeds thereof.

#### II.

The insured, as manager of the community of himself and plaintiff, at his death did not possess incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 of the Revenue Act of 1942.

#### III.

That defendant, as Collector, and the Commissioner of Internal Revenue improperly included \$40,000.00 representing the proceeds of said policies in the estate of said insured for Federal Estate Tax purposes.

IV.

Plaintiff overpaid the Federal Estate Tax on the estate of said insured in the sum of approximately \$10,088.90.

V.

There was overpayment of the Federal Estate Tax on the estate of William S. Godfrey, Deceased, in said sum of \$10,088.90.

VI.

Plaintiff is entitled to judgment against defendant for said sum of \$10,088.90 and for her costs of suit to be taxed. The tax liability in the estate of Godfrey is re-referred to the Treasury Department to determine the exact amount of liability in accordance with these Findings and Conclusions.

Whereupon, let judgment be entered accordingly in favor of plaintiff and against defendant for the said sum of \$10,088.90, or such sum as the Treasury Department certifies is due in accordance with these Findings and Conclusions.

Done in open court February . . . . , 1949.

.....,

United States District Judge.

Approved as to form as per Rule 5(d).

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ E. ELMER COLLETT,

Attorney for Defendant.

In the District Court of the United States for the  
Northern District of California, Southern Di-  
vision

No. 28659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMYTH, United State Collector of In-  
ternal Revenue,

Defendant.

### JUDGMENT

The above-entitled action came on for trial before the Court without a jury at San Francisco, California, Hon. Dal M. Lemmon, Judge presiding, plaintiff appearing by I. M. Peckham, her attorney, and defendant, James G. Smyth, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and W. E. Licking, Assistant United State Attorney, his attorneys, and evidence both oral and documentary was introduced by and briefs filed on behalf of the respective parties and the Court having considered the evidence introduced and the briefs submitted, and the Court having made its Findings of Fact and Conclusions of Law herein, it is ordered, adjudged and decreed that plaintiff have and recover of and from defendant, James G. Smyth, United States Collector of Internal Revenue, the sum of \$....., together with her costs to be taxed in the sum of \$.....

Dated: . . . . ., 1949.

. . . . .,

U. S. District Judge.

Approved as to Form as per Rule 5(d).

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ E. ELMER COLLETT,

Attorney for Defendant.



[Title of District Court and Cause.]

ORDER GRANTING A NEW TRIAL

Louise K. Godfrey having duly served and filed her motion for a new trial and said motion for a new trial having come on duly and regularly to be heard, both parties appearing on said hearing, and the matter having been heard and submitted to the court, and the court having considered the same, and being advised in the premises;

It Is Ordered, Adjudged and Decreed that Findings of Fact Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive, and judgment herein be and they are hereby vacated and set aside. and a new trial of this action is hereby granted to plaintiff on her motion on the issues embraced within Findings Number III, VIII and XVII and Conclusions of Law Number I to VI, inclusive.

Done in open court February . . . ., 1949.

.....,

Judge of the U. S. District  
Court.

[Endorsed]: Filed Feb. 1, 1949.

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[Title of District Court and Cause.]

### ORDER

Counsel for the plaintiff has been most industrious in his presentation of the pending motions. He has submitted to me two long memorandums and a summary of his argument. I know that he has sincere conviction that his position is meritorious and that the conclusion the Court has reached is faulty. My further study of the case, instead of bringing me to his way of thinking, fortifies my original conclusion. I am still of the conviction that the insurance trusts did not make Mrs. Godfrey the irrevocable beneficiary. I am still persuaded that the conversations had by the insured and his wife did not constitute an agreement.

If I were to hold contrary upon the question of the agreement my conclusion would not be altered. In California though the wife has an equal existing interest with her husband in the community property, including personal property, the husband has the control of the community personal property subject to certain restrictions with which we are not here concerned. It is probable that this control

would permit the husband to change a beneficiary designated and to borrow upon or receive the cash surrender value of a policy which is community property without the wife's consent in advance.

Each of the trust agreements provides that the trust shall become null and void "(a) if I shall revoke said appointment by written notice to said Company filed at its Home Office; (b) if both said Beneficiaries shall die before me; (c) if any change is made in the beneficiary or manner of payment of the proceeds of said policy; (d) if said policy shall be surrendered for Cash Surrender Value; (e) if I shall assign said policy and said assignment or written notice thereof be filed with the Company at its Home Office; (f) if at my death the net sum payable under said policy shall be less than Six Thousand Dollars."

The "I" referred to therein is William S. Godfrey, the insured. It is therefore quite clear that the trust agreements to which plaintiff gave written consents recognizes that Godfrey retained the right to assign the policy and to revoke the appointment, and that the right was reserved to change the beneficiary or manner of payment of proceeds and to surrender the policy for its cash value. Counsel in one of his memorandums sets forth these above quoted provisions and in pencil comments that the right to change the beneficiary or the manner of paying the proceeds, the surrender of the policy for cash value and the right to assign the policy retained by the insured is "contrary to G-s agreement." I can not understand

how this would be contrary to the agreement, assuming there was one, it is a part of the least assailable part of any agreement which might have existed. It has the solemnity of a writing. It does not depend upon the recollection of an interested party whose word may not now be disputed by any living witness to the conversation. It must be borne in mind that these trust agreements have not been attacked upon any equitable grounds. Plaintiff did not assail them either in her pleading or at the trial. As I understand Mrs. Godfrey, she stands upon the trust agreements and upon an oral understanding which she claims existed between the parties. The original negotiations merged in the writing and any verbal negotiations repugnant to the writing may not be considered. The insured did not part with all of his title to and enjoyment of the policies. He did not alienate all of his "possession or enjoyment." *Spiegel's Estate v. Commissioner of Internal Revenue*, 69 S. Ct. 301; *Commissioner of Internal Revenue v. Church's Estate*, 69 S. Ct. 322.

Plaintiff's motion to amend findings and judgment for a new trial are both denied.

Dated: May 2nd, 1949.

/s/ DAL M. LEMMON,

U. S. District Judge.

Copy mailed to Mr. Peckham and handed to Marshal.

[Endorsed]: Filed May 2, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES  
COURT OF APPEALS

Notice Is Hereby Given that Louise K. Godfrey, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 24, 1949, and from the order entered therein on May 2, 1949, denying plaintiff's motion to amend findings and judgment.

Dated, San Francisco, May 27, 1949.

/s/ I. M. PECKHAM,

Attorney for Appellant Louise  
K. Godfrey.

[Endorsed]: Filed May 27, 1949.

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In accordance with Rule 75 of the Rules of Civil Procedure plaintiff Louise K. Godfrey hereby designates all of the following parts of the record, proceedings, and evidence to be contained in the record on appeal:

1. Complaint filed September 17, 1947.
2. Order filed November 25, 1947, amending complaint on face.
3. Order filed November 25, 1947, as to dismissal of defendant United States.

4. Answer of defendant filed December 16, 1947.
5. Findings of fact and conclusions of law filed January 21, 1949.
6. Judgment filed January 21, 1949.
7. Notice of entry of judgment.
8. Notice of motion and motion to amend findings and judgment, and motion for new trial, filed February 1, 1949.
9. Order and opinion of May 2, 1949, denying motion to amend findings and judgment and denying motion for new trial.
10. Reporter's transcript of evidence and proceedings.
11. All exhibits admitted in evidence at the trial.
12. Notice of appeal filed May 27, 1949.
13. This designation.
14. Statement of points on which plaintiff intends to rely on her appeal.

Annexed hereto and served herewith is the statement of the points on which plaintiff intends to rely on her appeal.

Dated, San Francisco, June 7, 1949.

/s/ I. M. PECKHAM,

Attorney for Plaintiff and  
Appellant.

Copy received this 7th day of June, 1949. .

/s/ FRANK J. HENNESSY,  
U. S. Attorney.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAINTIFF INTENDS TO RELY ON HER APPEAL

1. The decision is contrary to the law in the case.
2. The decision is contrary to the evidence in the case.
3. The decision and judgment are contrary to the law and the evidence in the case.
4. The evidence is insufficient to support the decision.
5. The evidence is insufficient to support the decision and judgment.
6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary findings, conclusions, and judgment.
7. The decision and judgment are contrary to and against law.
8. The evidence shows that a decision and judgment should have been rendered in favor of plaintiff, and that the decision and judgment, as rendered, are contrary to law.
9. The court erred in denying plaintiff's motion to amend findings and judgment.
10. The court erred in denying plaintiff's motion for new trial.

Dated, San Francisco, June 7, 1949.

/s/ I. M. PECKHAM,

Attorney for Plaintiff and  
Appellant.

Copy Received this 7th day of June, 1949.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

[Endorsed]: Filed June 7, 1949.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying document, listed below, are the originals filed in this Court, or a true and correct copy entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorney for the Appellant:

Complaint for Refund of Taxes.

Order Amending Complaint on its Face.

Dismissal as to Defendant United States of America.

Answer.

Demand for Jury Trial.

Minute Order of January 26, 1948—Order Denying Motion for Trial by Jury.

Findings of Fact and Conclusions of Law.  
Judgment.

Notice of Entry of Judgment.

Notice of Motion and Motion to Amend Findings  
and Judgment, or, In the Alternative, To Vacate  
The Decision And Judgment And For a New Trial.  
Order.

Notice of Appeal to United States Court of Ap-  
peals.

Designation of Record on Appeal and Statement  
of Points on which Plaintiff Intends to Rely on  
Her Appeal.

Reporter's Transcript for April 9, 1948.

Plaintiff's Exhibits Nos. A, B, C, D, E, F, G, H  
and I.

In Witness Whereof, I have hereunto set my hand  
and affixed the seal of said District Court, this 23rd  
day of June, A.D. 1949.

C. W. CALBREATH,

Clerk,

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Title of District Court and Cause.]

### PROCEEDINGS

Friday, April 9, 1948—10:00 o'clock a.m.

The Clerk: Godfrey vs. United States.

Mr. Peckham: Ready.

The Court: You may proceed.

Mr. Peckham: If the Court please, this is an  
action against the Collector of Internal Revenue for

a refund of taxes we claim were erroneously assessed to the estate of William S. Godfrey, Jr., the estate tax assessed to his widow and distributee, who was the sole distributee of his estate. The original tax was paid under protest, and we contend that these \$40,000 in insurance policies—two policies, one for fifteen and one for twenty-five, that were covered by trust agreements, were improperly included in the original tax, and primarily on the ground it was community property and the new law of 1942, which took effect before the death of the deceased, was in effect taxing the assets of a partnership on the death of one party.

That has been resolved not only as to the community property, but as to insurance itself, as to the other policies, because of the ruling in the Wiener case, *Fernandez versus Wiener*, which was decided while these proceedings were in fieri.

But it left us with the single claim remaining that at the time the policies were taken out and a trust settlement in the proceeds established, there was an agreement between Mr. and Mrs. Godfrey that he would keep up these policies and keep them intact for the protection of herself and the family, and that agreement prevailed as to each of the two policies, and it is our contention that upon making such an agreement with the true beneficiary that the entire interest in the policy was transferred to the beneficiary and that, therefore, he could not deal with it as his own policy. The State law is to that effect and the Federal Court has looked the same way at least on one occasion.

We got nowhere with the Department on it, and that is the reason we are bothering your Honor with it.

The Court: Mr. Peckham, is there any dispute as to the facts?

Mr. Peckham: We have eliminated most of the dispute as to the facts, your Honor.

In April of 1924, Mr. Godfrey took out a policy of life insurance on his life in the New York Life. Counsel has a copy of that, and I have a photostatic copy which I will be glad to furnish.

Mr. Licking: We have copies of the two policies and trust agreement which are in question, there is no argument about those. Those may go in evidence.

Mr. Peckham: You have copies——

Mr. Licking: I prefer your copies because they are larger—your Honor has had some experience already with those small photostatic reproductions.

We can save time on this. Those may go in evidence. There is no question but what they were the two life insurance policies and there was the trust agreement. There is equally no question but what the tax was paid under protest.

The Court: What factual issue does that leave in the case, then?

Mr. Licking: Well, there is only one, as I see it, whether there was an agreement between Mrs. Godfrey and Mr. Godfrey that Mr. Godfrey would keep the policies in effect and wouldn't change the beneficiary, and then the legal question of whether, if there was such an oral agreement, it is admissible in

evidence. The Wiener case, as your Honor remembers, held that proceeds of trust where there was power of revocation in the trustor were part of the estate. Now, these trust agreements which are introduced in evidence here under our stipulation, each contain a power to change beneficiaries or to revoke the trust. That was the reason for the assessment of the tax, and if I understand counsel's contention correctly, it is because of the oral agreement between Mrs. Godfrey and the trustor that he would keep the trust in effect and would not change the beneficiary——

Mr. Peckham: It is our contention that under that agreement, without a breach of contract, he could not change beneficiaries without her consent.

Now, I will introduce the trust agreement. May it be marked as Exhibit A—it is already marked Exhibit A—the original trust agreement and the first policy for Fifteen Thousand, Number 8,751,507, we offer as Plaintiff's Exhibit A.

(The document referred to was marked Plaintiff's Exhibit A.)

Mr. Peckham: The second trust agreement on policy number 10,899,207, the policy and the two trust agreements introduced as one exhibit, Exhibit 3.

Mr. Licking: No objection.

(The document referred to was marked Plaintiff's Exhibit B.)



Mr. Peckham: Does your Honor want to inspect them?

The Court: Not now. Hand them to the Clerk.

Mr. Peckham: Mr. Cody, you have responded here to a subpoena duces tecum and you brought the records of the New York Life, did you?

Mr. Cody: Yes.

Mr. Peckham: I don't know if we will need any of Mr. Cody's testimony or not.

Mr. Licking: Well, I have admitted the policies in evidence and the trust agreement.

Mr. Peckham: Well, take the stand, Mr. Cody, and be sworn.

JARED CODY,

called for the Plaintiff, Sworn.

Direct Examination

By Mr. Peckham:

Q. Mr. Cody, you are local representative of the New York Life Insurance Company? A. Yes.

Q. That is a New York corporation, is it?

A. Yes.

Q. And you are familiar with the records and files in the case of—— A. Yes.

Q. ——William S. Godfrey, Jr. You have been requested to bring that here. You have the original documents of that file? A. Yes, I have.

Q. Now, Mr. Cody, do you recall the trust agreements that were made in 1924? A. Yes.

Q. Did Mr. Godfrey keep up the policies up to the time of his disability in 1937?

(Testimony of Jared Cody.)

A. Yes, he did.

Q. And he never—during that time—the same thing was true of the 1929 policy, was it not?

A. Yes, that is right.

Q. And he always paid the premiums up to the time of disability? A. Yes.

Q. Never made any attempt during that period to change the beneficiary?

Mr. Licking: Objected to on the ground it is immaterial.

The Court: Overruled.

Mr. Peckham: You may answer the question.

A. Not that I know of, no.

Q. Never made any attempt to assign the policies? A. No, we have no record of that.

Q. At all times up to the time of his disability he kept them in full force and effect? A. Yes.

Q. By the terms of his policies, if there is disability he was no longer obligated to pay premiums?

A. That is right.

Q. And the policies remained in force up to the time of his death? A. Yes.

Q. And you have settled in accordance with the trust agreement with Mrs. Godfrey?

A. Yes, that is right.

Mr. Peckham: Any questions?

Mr. Licking: None.

The Court: That is all.

Mr. Peckham: One moment.

Q. In that regard, you have also a letter, I believe, from the New York Life Insurance Company

(Testimony of Jared Cody.)

in which they insisted on Mrs. Godfrey joining in this trust agreement?

Mr. Licking: To which I object on the ground it is immaterial whether they did or not. The trust agreements speak for themselves.

The Court: Sustained.

Mr. Peckham: It is admitted that the company insisted upon her joining in the trust agreements in these policies in issue.

The Court: You say it is admitted?

Mr. Peckham: I don't say it is admitted, I say it is our contention that it was due to the insistence of the New York Life that he approached Mrs. Godfrey and asked her to agree to these agreements.

Mr. Licking: Objected to as immaterial.

The Court: I feel it is immaterial.

Mr. Peckham: Very well, your Honor. I am sorry to have disturbed you. If your Honor will bear with me just a moment, there is quite a few allegations that are now eliminated by counsel's stipulations.

I offer as Exhibit C the State tax return in the Estate of William S. Godfrey, Jr.

Mr. Licking: No objection.

(The document referred to was marked Plaintiff's Exhibit C.)

Mr. Peckham: And that was filed with the Collector on the date it bears date.

And we offer as Plaintiff's Exhibit next in order the notice of payment of tax under protest that was filed at the same time, together with the payment

of tax, and we offer in evidence letter of December 3, 1945—do you want these as separate exhibits?

Mr. Licking: No, put them all together, put them in as they went to the Collector. I suppose they all went together, didn't they?

Mr. Peckham: No, they are all separate.

The letter of December 3rd, 1945, to the Collector, together with the claim of refund on Form 843 that went in at the same time, and then the letter of December 11, 1945, pertaining to the same matter addressed to the Collector, and then the protest of May 14, 1946, addressed to F. M. Harless, and ask that those all go in as one exhibit, Exhibit D.

Mr. Licking: Are they arranged chronologically?

Mr. Peckham: Chronologically, from the bottom up.

Mr. Licking: I have no objection.

(The documents referred to were marked Plaintiff's Exhibit D.)

#### EXHIBIT D

Notice of Payment of Estate Tax Under Protest  
To the Honorable, the Collector of Customs of the  
United States at San Francisco, California.

Re: Estate of William S. Godfrey, Jr.

S. F. Superior 97680.

Sir:

I hand you herewith duplicate of form 706, Estate Tax Return, in the above entitled estate. The Estate Tax Return shows a total tax due of \$10,786.15. This amount we are paying you herewith,

Plaintiff's Exhibit D—(Continued)

under protest, however, for the reasons which hereinafter appear:

The within return is made according to the strict tenor of the Revenue Act of 1942, and the regulations made pursuant thereto.

But the act and the regulations are unconstitutional in this, that they forbid the deduction of 50% of the community property which, under California Law adopted long prior to said act and regulations, the widow had and has a vested interest in the community property to the extent of one-half thereof; that the community property is analogous to partnership property and the attempt to measure the estate tax on the husband's half interest by the value of the interest of the surviving partner of the community, denies the surviving partner due process of law.

For another reason, the act and regulations ought not properly to apply to at least \$40,000 of the life insurance. The policy No. 8751507 of the New York Life Insurance Company for the principal sum of \$15,000.00 was issued May 9, 1924, effective April 24, 1924.

On June 5, 1924, two several trust agreements were entered into between the insured decedent and the insurer, whereby a trust was erected in the proceeds of the policy and it is our contention that thereafter the insured had no control of the policy.

On December 21, 1929, policy No. 10,699,287 was issued by said insurer to said decedent for the sum

## Plaintiff's Exhibit D—(Continued)

of \$25,000.00 and on February 24, 1930, two separate trust agreements were made between the insured decedent and said insurer appropriating the proceeds of said policy in accordance with said trust agreements and thereafter the insured had no interest in said policy.

A further fact is this; That in July of 1937, the insured became incompetent from an incurable mental condition first diagnosed as schizophrenia and later determined to be dementia praecox. This condition was incurable and resulted in his total, permanent and continuing disability, in consequence of which on September 16, 1937, the Superior Court of California for San Francisco County in proceeding No. 76422, appointed a guardian for him and said guardianship continued until his death.

By the terms of each of said policies, the company waived payment of any premium due after proof of such disability and during such disability and thereafter no premiums were paid.

Photostatic copies of said policies and trust agreements are submitted herewith.

By the will of said decedent, two copies of which, one certified, are submitted herewith, all of the estate of said decedent was given to the widow, Louise K. Godfrey, the survivor of said community.

For the foregoing reasons we point out that the total sum of \$40,000.00, proceeds of said two insurance policies are not properly includable in the total taxable estate of the decedent although the strict

Plaintiff's Exhibit D—(Continued)

tenor of the Revenue Act of 1942 and the regulations thereunder require them to be included and they have been included in the said return.

For the foregoing reasons the said calculated estate tax of \$10,766.15 is paid under protest, it being the contention of the widow and executrix that there is no Federal death tax due on the above entitled estate.

Very respectfully yours,

/s/ LOUISE K. GODFREY,

Executrix of the Last Will and Testament of said decedent.

/s/ I. M. PECKHAM,

Attorney for Executrix.

December 3, 1945

The United States Collector of Internal Revenue  
110 McAllister Street  
San Francisco, California

Re: Estate of Godfrey

Dear Sir:

I hand you herewith claim of Mr. Louise K. Godfrey for a refund. This claim is filed with you at this time because we have just completed payment of tax and deficiency. The points that we raise are the non-includability of one-half of the community property, the non-includability of any of the insurance which was all community property and the non-includability of \$40,000.00 in insurance as to which insured and beneficiary had erected a trust

## Plaintiff's Exhibit D—(Continued)

in the proceeds many years ago, all of which appears on the face of the claim. The non-includability of the wife's share of the community property is now pending before the Supreme Court of the Supreme Court of the United States for adjudication in in two cases from Louisiana and Texas. I suggest that you withhold action on this claim for refund until the legal situation has been clarified by the Supreme Court decisions.

Very respectfully yours,

I. M. PECKHAM,

Attorney for Mrs. Louise K. Godfrey, widow and sole distributee of the Godfrey Estate.

IMP:cp

## TREASURY DEPARTMENT

Internal Revenue Service

(Revised April 1940)

## CLAIM

To be filed with the Collector where assessment was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Form 843

- Refund of Tax Illegally Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate or income taxes.)

Plaintiff's Exhibit D—(Continued)

State of California,  
County of San Francisco—ss.

Name of taxpayer or purchaser of stamps: Mrs. Louise K. Godfrey.

Business address: 405 Montgomery Street, San Francisco, California.

Residence: 232 Mallorca Way, San Francisco, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: San Francisco, California.

2. Period (if for income tax, make separate form for each taxable year) from .....19.., to ..... 19...

3. Character of assessment or tax: Estate tax.

4. Amount of assessment, \$15,076.91; dates of payment: 6/13/45 (\$10,786.15) 11/27/45 (\$4290.76).

5. Date stamps were purchased from the Government .....

6. Amount to be refunded: \$15,076.91.

7. Amount to be abated (not applicable to income or estate taxes) .....\$.....

8. The time within which this claim may be legally filed expires, under Section... of the Revenue Act of 19...., on: Nov. 27, 1948.

The deponent verily believes this claim should be allowed for the following reasons:

## Plaintiff's Exhibit D—(Continued)

Revenue Act of 1942 and Regulations thereunder are unconstitutional as applied to Estate of Wm. S. Godfrey.

They forbid deduction of 50% of the community property in which taxpayer widow and sole distributee had vested  $\frac{1}{2}$  interest. Measuring decedent's estate by her  $\frac{1}{2}$  interest denies due process.

All of the insurance was community property in which widow had vested  $\frac{1}{2}$  interest.

As to \$40,000 of the insurance: N. Y. Life Policy No. 8751507 for \$15,000 was issued May 9, 1924. On June 5, 1924 deceased insured and wife beneficiary made two several trust agreements with insurer, erecting trust in proceeds and thereafter insured had no control over policy.

N. Y. Life Policy No. 10,899,287 for \$25,000, was issued December 21, 1929. On Feb. 24, 1930, two several trust agreements made by deceased insured and wife beneficiary erecting trust in proceeds.

Thereafter insured had no interest in policy.

July 1937, decedent became permanently disabled and incurable incompetent. By all the policies further premiums were waived on the disability and no premiums were paid thereafter.

No part of said policies were includable in the gross estate taxed.

/s/ LOUISE K. GODFREY.

Sworn to and subscribed before me this 3rd day of December, 1945.

LOUIS WIENER,

Notary Public.

Plaintiff's Exhibit D—(Continued)

December 11, 1945

U. S. Collector of Internal Revenue  
110 McAllister Street  
San Francisco, California

Re: Estate of Godfrey, S. F. Superior 97680  
Died November 6, 1944.

Dear Sir:

On December 3, 1945, I filed with you the claim of Mrs. Louise K. Godfrey, widow and sole distributee, on your Form 843.

According to my best information, the Supreme Court passed on the question of non-includability of half the community property yesterday. I have not yet had a chance to inspect the opinion, but I hasten to inform you that we still have the point of the non-includability of \$40,000.00 in insurance, as to which the insured and the beneficiary had erected a trust in the proceeds many years ago. We still feel that under the Treasury decision this \$40,000.00 of insurance should not have been included in the gross estate. for the purpose of Federal estate tax, for the reason that it had passed from the dominion of the insured.

Very respectfully yours,

.....,

Attorney for Louise K. Godfrey, widow and sole distributee.

IMP:ml

## Plaintiff's Exhibit D—(Continued)

Hon. F. M. Harless

U. S. Internal Revenue Agent In Charge

74 New Montgomery Street

San Francisco, California

RE: Estate of William S. Godfrey, Jr.

Your File NT-ET- First Calif.

Dear Sir:

Louise K. Godfrey formerly executrix and sole distributee of the above entitled estate, individually and as such Executrix, hereby makes protest of the proposed action of the Internal Revenue Agent in Charge, denying her application for a refund of \$15,076.91, on the ground that as to the two insurance policies of the New York Life Insurance Company, Nos. 8,751,507 and 10,899,287, the policies were governed by a Trust Agreement, made and entered into by the insured with the Insurance Company, and consented to and actually executed by this affiant, then the wife of the insured and now his widow, whereby the insured agreed to retain and keep up said policies of insurance, and that he would not revoke or alter the Trust Agreement, but would keep the same as as protection for Mrs. Godfrey and her children; that in accordance with said agreement said insured did not retain a right to surrender or revoke his nomination as beneficiary, or the said Trust Agreement. That all property in said policy retained by said insured was subject to said agreement between the insured and this claimant. Therefore, the said policies of insurance were not

Plaintiff's Exhibit D—(Continued)

includable in the gross estate of the insured, subject to the Federal Estate Tax.

Dated: San Francisco, California, May 14, 1946.

LOUISE K. GODFREY,

Widow and Executrix and sole distributee of the Estate of William S. Godfrey, Jr., Deceased.

Compliance with TD Form 1292.

Name and address of Taxpayer: Louise K. Godfrey, Executrix of Estate of William S. Godfrey, Jr. of 232 Mallorca Way, San Francisco, California.

Date and symbol of letter advising of readjustment as to which protest is made; April 8, 1946. No symbol other than heading this letter.

Schedule of Findings as to which taxpayer excepts:

Estate Tax. Overassessment None. Correct tax liability \$15,076.91.

“Par. 2. Re: Proceeds of N. Y. Life Policies #8,751,507 and #10,899,287, totalling \$40,000—deceased retained all or sufficient incidents of ownership to include proceeds as part of taxable gross estate.”

Grounds of exception: As to these two policies, there were trust agreements made years before the tax act applicable, founded on the agreement of the wife, principal beneficiary, which taken together negatived any real retention of the incidents of ownership, rendering the proceeds of the policies includable.

Year for which tax assessed: 1944.

Taxpayer desires a hearing.

## Plaintiff's Exhibit D—(Continued)

Protest prepared by I. M. Peckham, 405 Montgomery Street, San Francisco, California, who does not know of his own knowledge the facts concerning the agreement between the insured and the beneficiary inconsistent with any real retention of the "incidents of ownership" relied on by the Agent in Charge.

Said attorney is admitted to practice before the Treasury Department. Power of Attorney accompanies this protest.

Said attorney has no agreement with taxpayer for any fixed fee for representing her in this matter.

/s/ LOUISE K. GODFREY.

## Affidavit In Support Of Protest

State of California,

City and County of San Francisco—ss.

Louise K. Godfrey, being sworn deposes and says:

That she is a citizen of the United States and a resident of the City and County of San Francisco. That she was the Executrix during its pendency of the estate of William S. Godfrey, Jr., deceased and sole distributee thereof, and was the wife of said William S. Godfrey, Jr., deceased, at the time that those certain Trust Agreements were made between William S. Godfrey, Jr., the insured and the New York Life Insurance Company, a life insurance company incorporated in the State of New York.

New York Life Policy No. 8,751,507, had theretofore been applied for and issued to William S. Godfrey, Jr., the said insured, and that the premiums

## Plaintiff's Exhibit D—(Continued)

thereon were to be paid out of the community property of William S. Godfrey and affiant. The policy was issued April 24, 1924, and the Trust Agreement was made June 5, 1924.

The Policy No. 10,899,287 was issued February 24, 1930, and the Trust Agreement was made February 24, 1930.

In each case, at the time of the making of the Trust Agreements, Mr. Godfrey, the insured, requested affiant to sign a document releasing her community interest in the policies for the purpose of erecting the Trust, and affiant actually signed and became a party to the Trust Agreement.

At the time, Mr. Godfrey requested the plaintiff to sign the document releasing her community in the policies and consent to the trust arrangement, Mr. Godfrey promised and agreed with affiant that he would keep up the said policies for the protection of herself and the children and would pay all the premiums thereon and would retain and not surrender the policies, and that he would not make any change in the Trust arrangements, and it was in reliance on said promise that affiant consented to the making of the Trust Agreements. That Mr. Godfrey did retain the policies, kept up the Trust Agreement and never did make any attempt to alter the Trust Agreement or revoke it in any way during his lifetime.

That notwithstanding the Trust Agreements on their face provided that the agreement shall be void if the insured revokes the appointment, or makes

## Plaintiff's Exhibit D—(Continued)

any change in beneficiary, or any of the payments on proceeds of the policy, or surrender the same for cash value, said provisions were inconsistent and at variance with the plain contract and agreement of Mr. Godfrey at the time this affiant signed the Trust Agreements.

Wherefore, affiant asserts that she had a vested interest in the Trust Agreements inconsistent with the provision for the annulment or agreement on a surrender, revocation or changing beneficiary. That it was a contract between the insured and this affiant that he would retain and keep up the policies and not attempt to revoke or change the Trust Agreement.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 23rd day of May, 1946.

[Seal]                      LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed April 9, 1948.

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Mr. Peckham: Now the receipt for the remittance of November 27, 1947, for the deficiency of the estate tax of \$4,290.76—you have that?

Mr. Licking: No, I haven't.

Mr. Peckham: What?

Mr. Licking: You are going to furnish me copies of all these materials?

(The document last introduced in evidence was marked Plaintiff's Exhibit E.)

PLAINTIFF'S EXHIBIT E  
Form 880—Revised July 1942  
TREASURY DEPARTMENT  
Internal Revenue Service

List: Nov. '45.

ORIGINAL

Notice and Demand for Estate Tax

Collector's Paid Stamp:

Rec'd with remittance 94 Nov. 27, 1945, Coll. Int.  
Rev., 1st Dist., Cal.

To avoid further interest the amount on this notice must be paid to Collector of Internal Revenue at San Francisco, Calif.

Date November 26, 1945.

Name and Address:

Estate of William S. Godfrey, Jr.,  
c/o Louise K. Godfrey, Executrix  
232 Mallorca Way  
San Francisco, Calif.

Old Balance or Remarks:

Died: Nov. 6, 1944  
Deficiency Estate Tax  
Waiver

Assessment:

\$4,290.76

Amount Paid:

\$4,290.76

Balance Due:

[Endorsed]: Filed April 9, 1948.

Mr. Peckham: The copies that you requested—Mr. Licking requested—he already has annexed to an affidavit.

Mr. Licking: They are attached to the affidavit?

Mr. Peckham: Yes.

Mr. Licking: Thank you.

Mr. Peckham: From the guardianship proceeding we offer in evidence the—San Francisco Superior Number 76422, we offer in evidence Order Appointing Guardian, Duplicate of letters of Guardianship, a copy of Petition for Leave to Borrow Money, the Order Permitting the Borrowing of Money, and the Appraisal in the Guardianship of William S. Godfrey, San Francisco Number 76422.

Mr. Licking: I have no objection. I have no doubt those are proper copies, but it seems to me they are immaterial.

Mr. Peckham: Counsel waiving certification?

Mr. Licking: I am waiving certification of the copies, but it seems to me they are immaterial.

The Court: What is the materiality?

Mr. Peckham: If the Court please, one of the things that the Government relied upon is that when this disability fell on Mr. Godfrey, Mr. Godfrey became incompetent, and she tried to restore him to competency and incurred claims and bills, the children were in college, she had to borrow money, and she borrowed the money the first way she could get it without pledging the stock in the corporation, and that was by borrowing on the

policies, and the Government has contended that by borrowing money as his guardian that constitutes an admission that the policies were not her policies, that the policies were policies of the estate.

Mr. Licking: For that purpose I withdraw my objection.

(The documents referred to were marked Plaintiff's Exhibit F.)

### PLAINTIFF'S EXHIBIT F

In the Superior Court of the City and County of  
San Francisco, State of California

### INVENTORY AND APPRAISEMENT

Probate Code 600-609

No. 76422 Probate

In the Matter of the Estate of

WILLIAM S. GODFREY, JR.,

An incompetent person.

Date of Adjudication of Incompetent: September  
16, 1937.

### OATH OF APPRAISER

State of California,

City and County of San Francisco—ss.

P. Paul Vlautin, Sr., appraiser of the estate of William S. Godfrey, Jr., an incompetent, being sworn, says: that he will truly, honestly, and impartially appraise the property of said estate, which shall be exhibited to him, according to the best of his knowledge and ability.

P. PAUL VLAUTIN.



Plaintiff's Exhibit F—(Continued)

Corporate Stocks

Certificate No. 14 for 167 shares of common stock of the Irving Theatre & Realty Co., a corporation—valued at—

Certificate No. 8 for 1 share of common stock of Irving Theatre & Realty Co., a corporation—Valued at ..... \$15,000.00

Certificate No. 33 for 99 shares of common stock of North Beach Theatres Inc., a corporation—valued at—

Certificate No. 24 for 1 share of common stock of North Beach Theatres Inc., a corporation—Valued at ..... 5,000.00

Certificate No. 14 for 500 shares of Fairmont Theatre Co., a corporation—valued at—

Certificate No. 9 for 1000 shares of common stock of Fairmont Theatre Co., a corporation—valued at—

Certificate No. 1 for 1 share of common stock of Fairmont Theatre Co., a corporation—Valued at ..... 5,000.00

Certificate No. C-251032 for 100 shares of common stock of Standard Brands Inc., a corporation—Valued at ..... 975.00

Certificate No. WO-47118 for 8 shares Radio Corporation of America, a corporation—Valued at ..... 66.00

## Plaintiff's Exhibit F—(Continued)

Fractional receipt No. 214485 for fractional interest of 26 shares of common stock of Radio Corporation of America, option date expired—Valued at . . . . .	nil
Certificate No. N.F. 68664 for 20 shares of common stock of P. G. & E. Co., a corporation—Valued at . . . . .	505.00
Certificate No. F-108865 for 2 shares of common stock of P. G. & E. Co., a corporation—Valued at . . . . .	50.50
1 promissory note for \$13,000.00 from the Fairmont Theatre Co., a corporation, to the order of William S. Godfrey, Jr., dated July 16, 1937—Valued at . . . . .	13,000.00
Total . . . . .	\$39,865.20

So far as can be ascertained by said Guardian the estate mentioned in the foregoing inventory is community property.

I, the undersigned appraiser of the estate of William S. Godfrey, Jr., an incompetent, hereby certify that the property in the foregoing inventory described has been exhibited to and examined by me, and that I appraise each item thereof as of the time of the adjudication of incompetent, at the figures set opposite that item, and the whole of said property at the sum of Thirty Nine Thousand Eight

Plaintiff's Exhibit F—(Continued)  
Hundred and Sixty-Five and 20/100 dollars (\$39,-  
865.20).

Dated: October 19th, 1937.

P. PAUL VLAUTIN, SR.,  
Appraiser.

Verified Account of Appraisers

Estate of Willam S. Godfrey, Jr., Incompetent,  
To P. Paul Vlautin, appraiser. Dr.

To compensation for services in appraising said  
estate—items as follows: . . . .days services at \$. . . .  
per day each:—\$39.86.

Necessary disbursements—as follows: Notary fees  
—\$1.50: Total—\$41.36.

State of California,  
County of San Francisco—ss.

P. Paul Vlautin, Sr., the appraiser above named,  
being duly sworn, say: that the foregoing bill of  
items is correct and just, and that the services have  
been duly rendered as therein set forth.

P. PAUL VLAUTIN, SR.

Subscribed and sworn to before me, this 19th day  
of October, 1937.

[Seal] MARGARET IRWIN.

My Commission Expires February 24, 1938.

I. M. PECKHAM,  
GEORGE E. HARRIS,  
Attorneys for Guardian.

## Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,  
 in and for the City and County of San Francisco  
 No. 76422 Dept. No. 9 Probate

In the Matter of the Estate and Guardianship of  
 WILLIAM S. GODFREY, JR.,  
 an incompetent person.

ORDER AUTHORIZING BORROWING  
 OF MONEY

On reading and filing the verified petition of Louise K. Godfrey, guardian of the person and estate of said ward, and good cause appearing therefor, it is hereby ordered, adjudged and decreed that Louise K. Godfrey, guardian of the person and estate of William S. Godfrey, Jr., the above named ward, be and she hereby is authorized and directed to borrow from the New York Life Insurance Company, a life insurance corporation, incorporated in the State of New York, the sum of \$6534.00 upon the following policies upon the life of said ward, in the following amounts:

policy number 10,899,289	\$1159.00
policy number 10,899,287	\$2875.00
policy number 8,751,507	\$2500.00
a total of	\$6534.00

Done in Open Court at San Francisco, this 18th day of September, 1937.

.....,

Judge of said Superior Court.

Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,  
in and for the City and County of San Francisco

No. 76422 Dept. No. 9 Probate

In the Matter of the Estate and Guardianship of

WILLIAM S. GODFREY, JR.,

an incompetent person.

PETITION FOR LEAVE TO BORROW MONEY

To the above entitled Superior Court, the Petition of Louise K. Godfrey, guardian of the above named incompetent respectfully shows:

I.

That on September 16, 1937, the above entitled Court duly gave, and made its order appointing petitioner as guardian of the above named ward; that petitioner immediately qualified as such and is now the duly appointed, qualified and acting guardian of the person and estate of said ward.

II.

That said ward was under treatment privately for more than three months at the time his disability came upon him, and bills were incurred, the exact extent of which has not yet been determined. At said time, arrangements had also been made to matriculate the son and daughter of said ward in Menlo Junior College and Mills College respectively, and notwithstanding said disability it seemed wise to petitioner to carry out the plans of said ward

## Plaintiff's Exhibit F—(Continued)

and have said son and daughter matriculate as planned; that the expenses of said matriculation will be \$1350.00 and \$1300.00 respectively.

## III.

That there is only a small amount of cash, \$100.00 or thereabouts, that has come into the hands of petitioner as guardian of said ward, but said ward had three separate policies of life insurance with the New York Life Insurance Company, a life insurance company incorporated in the State of New York, one numbered 10,899,289, for \$10,000.00; one numbered 10,899,287, for \$25,000.00, and one numbered 8,751,507, for \$15,000.00; that the loan value of said policies is in excess of \$8400.00; that it is for the best interest of the estate of said ward to borrow from said life insurance company, the following sums on each of said policies:

policy 10,899,289, the sum of	\$1159.00;
policy 10,899,287, the sum of	\$2875.00;
policy 8,751,507, the sum of	\$2500.00;
a total of	\$6534.00;

that in the opinion of petitioner, it is necessary, expedient and for the best interest of the estate of said ward to borrow said sums.

Wherefore, petitioner prays the order of the above entitled Court authorizing said petitioner as

Plaintiff's Exhibit F—(Continued)

guardian of said ward to borrow the sum of \$6534.00 from said life insurance company on said polices.

LOUISE K. GODFREY,

Guardian of said ward,

By I. M. PECKHAM and

GEORGE HARRIS,

Attorneys for said Guardian.

State of California,

City and County of San Francisco—ss.

Louise K. Godfrey, being first duly sworn, deposes and says:

That she is the petitioner in the foregoing Petition, and the guardian of the above named incompetent; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to those matters that are therein stated upon her information and belief, and as to those matters, she believes it to be true.

.....

Subscribed and sworn to before me this.....day of September, 1937.

.....,

Notary Public in and for the City and County of San Francisco, State of California.

County Clerk Probate Dept. Form No. 15

Duplicate Filed September 16, 1937.

H. A. VAN DER ZEE,

Clerk,

By /s/ S. I. HUGHES,

Deputy Clerk.

## Plaintiff's Exhibit F—(Continued)

In the Superior Court of the State of California,  
in and for the City and County of San Francisco

## LETTERS OF GUARDIANSHIP

Department No. 9 Probate  
No. 76422

State of California,  
City and County of San Francisco—ss.

Louise K. Godfrey is hereby appointed Guardian of the Person and Estate of William S. Godfrey, Jr., an incompetent person.

Witness, H. A. van der Zee, Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, with the Seal of said Court affixed this 16th day of September, A.D. 1937.

By order of the Court,

H. A. VAN DER ZEE,  
Clerk,

[Seal] By /s/ S. I. HUGHES,  
Deputy Clerk.

State of California,  
City and County of San Francisco—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Guardian of the Person and

Plaintiff's Exhibit F—(Continued)

Estate of William S. Godfrey, Jr., an incompetent person, according to law.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me this 16th day of September, 1937.

/s/ S. I. HUGHES,

Deputy County Clerk.

In the Superior Court of the State of California,  
in and for the City and County of San Francisco  
Department No. 9 Probate

No. 76422

### ORDER APPOINTING GUARDIAN

In the Matter of the Estate and Guardianship of  
WILLIAM S. GODFREY, JR.,  
an incompetent person.

The petition of Louise K. Godfrey praying to be appointed the Guardian of the person and estate of said William S. Godfrey, Jr., an incompetent person, coming on regularly to be heard, upon due proof to the satisfaction of said Court that notice has been given to the relatives of the said William S. Godfrey, Jr., an incompetent person, residing in this City and County, and to the person under whose care said William S. Godfrey, Jr., now is as required by law and as directed by this Court; and it duly appearing to the Court that said William S. Godfrey, Jr., is a resident of the said City and

## Plaintiff's Exhibit F—(Continued)

County, and that he has estate within the State of California, which need the care and attention of some fit and proper person, which estate is of the value of \$.....

It Is Hereby Ordered, That said Louise K. Godfrey be and she is hereby appointed Guardian of the person and estate of said William S. Godfrey, Jr., an incompetent person, and that letters of Guardianship of the person and estate of said William S. Godfrey, Jr., an incompetent person, be issued to Louise K. Godfrey upon her giving bond to said William S. Godfrey, Jr. said incompetent, in the sum of Five Thousand Dollars.

Dated this 16th day of September, 1937.

/s/ F. H. DUNNE,

Judge of the Superior Court.

Filed October 20, 1937.

H. A. VAN DER ZEE,

Clerk.

[Endorsed]: Filed April 9, 1948.

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Mr. Peckham: Now, from the probate estate number 97680 we offer in evidence the last will and testament—you have a copy that you prefer to have me use instead of mine?

Mr. Licking: The copy I have is one of these unfortunate small photostatic reproductions.

Mr. Peckham: The only significance of it is the

provision leaving his estate to Mrs. Godfrey. We will substitute that for this, if you don't mind.

Mr. Licking: What do you mean?

Mr. Peckham: For this one (exhibiting). My copy, you object to that because it is marked.

Mr. Licking: There are some pencil marks on this, if the Court please. They would not mislead the Court, if your Honor please, and they can be erased. It is easier to read that than this.

Mr. Peckham: We offer, then, from the probate records the copy of the will of March 4, 1930, the order admitting it to probate, the letters testamentary, and the decree of settlement of first and final account and of distribution, as one exhibit next in order.

Mr. Licking: I have no objection to the correctness of the copies; however, I can't see the materiality of it to the question here, and I object on that ground.

The Court: Overruled.

(The documents referred to were marked Plaintiff's Exhibit G.)

## PLAINTIFF'S EXHIBIT G

In the Superior Court of the State of California,  
in and for the City and County of San Francisco

No. 97680

In the Matter of the Estate

of

WILLIAM S. GODFREY, JR.,

Deceased.

DECREE OF SETTLEMENT OF FIRST AND  
FINAL ACCOUNT AND OF DISTRIBUTION

Comes now Louise K. Godfrey, the executrix of the last will and testament of William S. Godfrey, Jr., said decedent, by I. M. Peckham, her attorney, and presents to the court for settlement and allowance, her first and final account showing charges in favor of said estate amounting to \$104,300.31, and claiming credits amounting to \$19,537.95 and leaving a balance of \$84,762.36 in her hands belonging to the said estate and she now proves to the satisfaction of the court that the said account was filed on July 16, 1945; that on the same day the Clerk appointed the 30th day of July, 1945, as the day for the settlement thereof and that due notice of the time and place of the said settlement and hearing has been duly given as required by law and no person appearing to except to or contest said account the court, after hearing the evidence, finds said account correct.

Wherefore, It Is Ordered, Adjudged and Decreed

by the court that said account be and it hereby is in all respects approved, allowed and settled as presented and that the attorney's fees of said executrix for the ordinary and extraordinary services of said attorney be fixed, settled and allowed at the sum of \$1800.00

And it appearing that on the same day the executrix filed her petition for distribution and that the same was set for hearing at the same time and that due and legal notice of the time and place of hearing has been given as required by law and the court, after hearing the evidence, orders distribution of said estate as follows:

It is ordered, adjudged and decreed by the court that said deceased left surviving as his only heirs at law, those certain persons whose names and relationship to said decedent are as follows:

Louise K. Godfrey, widow, residing at 232 Mallorea Way, San Francisco, California;

Norma A. Godfrey, daughter, residing at 232 Mallorea Way, San Francisco, California;

William S. Godfrey III, residing at 206 Fairmont Street, San Francisco, California.

Said decedent died testate and all of his estate was distributed by his will as hereinafter decreed and all the residue of said estate and all other property of said estate either described herein or not, whether known or unknown and wheresoever situated be distributed according to law and the provisions of said will as follows:

To Louise K. Godfrey all of the residue of said estate.

Said residue so distributed to Louise K. Godfrey, consists, insofar as is now known, of the following items:

Cash in the Jones-Market Branch of the Anglo California Trust Company.

U. S. War Bonds of the face value of.

1 Pontiac 1937 business coupe automobile.

1 Olds 1940 Sedan automobile.

Household furniture at residence at 232 Malloreca Way, San Francisco, California.

The following certificates of corporate stock:

Cert. #14 for 167 shares and cert. #8 for 1 share of common stock of Irving Theatre and Realty Co., a corporation incorporated in the State of California.

Cert. #14 for 500 shares, cert. #9 for 1000 shares and cert. #1 for 1 share of common stock of Fairmont Theatre Company, a corporation incorporated in the State of California.

Cert. #33 for 99 shares and cert. #24 for 1 share of common stock of North Beach Theatres, Inc., a corporation incorporated in the State of California.

Cert. #NT 65704 for 25 shares of common stock of Standard Brands, Inc., a corporation.

Cert. #WO-47118 for 8 shares of common stock of Radio Corporation of America, a corporation.

Cert. #NF 68664 for 20 shares, and cert. #F-108865 for 2 shares of common stock of Pacific Gas

and Electric Co., a corporation incorporated in the State of California.

Done in Open Court this 30th day of July, 1945.

T. I. FITZPATRICK,

Judge of Said Superior Court.

[Endorsed]: Filed July 30, 1945, H. A. van der Zee, Clerk, by Luther Dobson, Deputy Clerk.

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In the Superior Court of the State of California in  
and for the City and County of San Francisco  
Department No. 9 Probate

Letters Testamentary

No. 97680

State of California,

City and County of San Francisco—ss.

The last Will of William S. Godfrey, sometimes called William S. Godfrey, Jr., sometimes called William Sherman Godfrey, sometimes called William Sherman Godfrey, Jr., deceased, having been proved and recorded in the Superior Court of the State of California, in and for the City and County of San Francisco, Louise K. Godfrey who is named therein as such, is hereby appointed Executrix thereof.

Witness, H. A. van der Zee, Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, with the Seal of said Court affixed.

Dated December 1st, 1944.

By order of the Court,

H. A. VAN DER ZEE,  
Clerk.

[Seal] By /s/ [Illegible.]

Deputy Clerk.

State of California,

City and County of San Francisco—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Executrix of the Last Will and Testament of the above-named deceased, according to law.

/s/ LOUISE K. GODFREY.

Subscribed and sworn to before me Dec. 1, 1944.

/s/ [Illegible.]

Deputy County Clerk.

In the Superior Court of the State of California  
in and for the City and County of San Fran-  
cisco

No. 97680—Dept. No. 9

In the Matter of the Estate

of

WILLIAM S. GODFREY, Sometimes Called Wil-  
liam S. Godfrey, Jr., Sometimes Called Wil-  
liam Sherman Godfrey, Sometimes Called Wil-  
liam Sherman Godfrey, Jr.,

Deceased.

ORDER ADMITTING WILL TO PROBATE  
AND FOR LETTERS TESTAMENTARY  
AND FOR FAMILY ALLOWANCE PEND-  
ING RETURN OF INVENTORY

Now comes the petitioner, Louise K. Godfrey, by I. M. Peckham, her attorney, and proves to the satisfaction of the court that the time for hearing the petition for probate of the will herein filed on the 16th day of November, 1944, and for letters testamentary thereon, was by the Clerk duly set for December 1, 1944, and that notice of said hearing has been duly given in the manner and for the time required by law; and no person appearing to contest the said petition, the court proceeded to hear the evidence and thereupon finds that all the facts alleged in said petition are true and that said petition ought to be granted.

It Is Therefore Ordered, Adjudged and Decreed

by the court that William S. Godfrey, also called William S. Godfrey, Jr., also called William Sherman Godfrey, also called William Sherman Godfrey, Jr., died on November 6, 1944, a resident of the City and County of San Francisco, State of California, leaving estate in said city and county, and that the document heretofore filed, purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased; that Louise K. Godfrey be appointed executrix of the said last will and testament, and that letters testamentary issue to said Louise K. Godfrey without any bond, upon her taking the oath required by law.

It Is Further Ordered that the said executrix be and she hereby is authorized and directed to pay to Louise K. Godfrey, widow of said deceased, for her support and maintenance the sum of \$500.00 per month, the same to date from the date of the death of said decedent, to wit: November 6, 1944, and to continue on the corresponding day of each and every month thereafter during the administration of said estate, or until otherwise ordered by this court.

Done in Open Court this 1 day of December, 1944.

/s/ T. I. FITZPATRICK,

Judge of the Superior Court.

#### Last Will and Testament

I, William S. Godfrey, sometimes known as William S. Godfrey, Jr., being of sound mind and dis-

posing memory and not acting under the advice, fraud, influence or duress of any person or persons, but acting solely upon my own free will, do hereby make and declare this to be my Last Will and Testament, and give and bequeath my property of whatever I may die possessed of, in the following manner, that is to say:

First:—I desire to be buried according to my station in life and direct my Executrix, hereinafter appointed, to pay the expenses of my funeral and those of my last illness, as soon as there is sufficient moneys in my estate to liquidate the same.

Second:—I give and bequeath my property, whatever I may die possessed of, real, personal or mixed, to my beloved wife, Louise Godfrey, without any qualifications, limitations or conditions.

Third:—I expressly make no provision for my children, William S. Godfrey and Norma Godfrey, minors, as I am satisfied in my mind that my beloved wife will take care of them and each of them to the best of her ability and give them such support, maintenance and education as I would have done if living.

Fourth:—I hereby designate and appoint my said wife, Louise Godfrey, sole Executrix of this My Last Will and Testament, and expressly request that no bonds or undertaking be required of her prior to qualifying as such, and I further authorize and empower her, the said Louise Godfrey, as such Executrix, to sell the whole or any portion of my estate

at public or private sale, as she may deem best and beneficial, without the necessity of obtaining therefor an order of Court prior to the making of said sale, and without being required to give any bond or undertaking prior to such sale.

In Witness Whereof, I have hereunto set my hand and seal this 4th day of March, 1930.

[Seal]                      WILLIAM S. GODFREY.

We, the undersigned, do hereby certify that on the date last written, William S. Godfrey, sometimes known as William S. Godfrey, Jr., executed the above instrument in our presence and in the presence of each other, and then and there declared to us and each of us, in the presence of each other, that the same was his Last Will and Testament; and we thereupon, at his request and in his presence and in the presence of each other, signed our names as witnesses thereto.

HARRY SACK,

Residing at Whitcomb Hotel,  
San Francisco.

A. NEWBURGH,

Residing at 2257 Vallejo St.,  
San Francisco, Cal.

[Endorsed]: Filed April 9, 1948.

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Mr. Peckham: The order for discharge is not there, your Honor, but actually it was made September 17 of 1945, and I think counsel will probably stipulate to that.

Mr. Licking: I have no question—you can substitute a copy when you get it, I have no question that that is a fact, but it seems to me it is incompetent and immaterial to any issue here, and I object on that ground.

The Court: I don't see the materiality of the discharge.

Mr. Peckham: It is just this, your Honor: It is necessary to find the claim for this refund completely in the distributee, Mrs. Godfrey, that she be discharged in the probate proceeding.

The Court: If there was a distribution, wouldn't that find it?

Mr. Peckham: Pardon me?

The Court: If there was a distribution, wouldn't that find it?

Mr. Peckham: I would say so, but not under the view of the Treasury, your Honor.

The Court: Sustained.

Mr. Peckham: Now, the seventeenth allegation we allege that by reason of the wrongful inclusion of these two policies there was an overcharge of estate taxes of \$10,088.90. My tax accountant has died several months back, and I understand it is the practice, if counsel consents to it, if the Court finds that these policies were wrongfully included, that the matter be referred to the Internal Revenue to refigure the tax with the policies out. We have had difficulties with adjustments and they have all to be referred afterwards to provide for that, because the controller and the treasury won't

pay the judgment where the interest is not figured according to their policies.

In other words, your Honor, we will consent to the substitution of the Treasury Department for this Court.

The Court: Substitute the executive branch for the judicial.

Mr. Peckham: Is that agreeable? [13\*]

Mr. Licking: I feel that is proper. If there is anything due, the sum that is due will be because of improper inclusion of these two policies in the trust fund.

Mr. Peckham: Mrs. Godfrey, will you come forward—oh, Mr. Rattenbury, one of the witnesses in this case, is the agent who wrote these policies, your Honor, and I prepared an affidavit for Mr. Rattenbury after examining him very carefully in the office of Mr. Cody, and submitted a copy to counsel to stipulate that if he were called he would testify that way, and counsel told me that he could not see his way to so stipulate, so I subpoenaed Mr. Rattenbury, who was down here and reported to my office yesterday, and the situation in his household is this, that his wife has been operated on for a tumor, proved to be malignant, and the succession of operations has affected her mentally and he is afraid to leave her any more, he can't leave her any more. He lives up in Dixon. He is the same W. A. Rattenbury who was in charge of the Sacramento office of the New York Life at one time. He

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\* Page numbering appearing at top of page of original Reporter's Transcript.

still keeps an office in Sacramento. So under the circumstances he cannot be here, and he has made an affidavit and requests the Court to excuse him from testifying here, and accept in lieu thereof the testimony he has given in the affidavit which was formerly prepared.

Mr. Licking: Well, I haven't any doubt that Mr. Rattenbury, if called and if permitted by the Court to answer the interrogatories which elicited the statements made in this affidavit would make those statements, but the materiality of the statements and the propriety of the statements is objectionable—most of the statements made by Mr. Rattenbury in this affidavit are immaterial, a great many of them are clearly hearsay, and from the first testimony introduced in what he considered a clear violation of the trust covenant, they are objectionable entirely on that ground. The covenant of the trust provides that the beneficiaries may be changed. That is the trust that is in evidence.

If your Honor will look through the affidavit, it is short—

Mr. Peckham: The affidavit I propose to file with the affidavit he made yesterday explaining why he is not here this morning—

Mr. Licking: Well, the affidavit explaining why he is not here, there is no objection.

Mr. Peckham: Your Honor doesn't want that read, do you?

The Court: No.

Mr. Peckham: We will offer that in evidence.

(The document referred to was marked Plaintiff's Exhibit H.)

Mr. Licking: I don't think there is any question but what that is true.

Mr. Peckham: Now, the affidavit of Rattenbury itself is [15] this, and I suggest that we examine and go over the contents of it.

Mr. Rattenbury, sworn—title of court and cause, affidavit of witness and stipulation.

“W. A. Rattenbury, being first duly sworn, says:

“I am a citizen of the United States and of the State of California over the age of twenty-one years and not a party to the above-entitled action,” and so forth and so on.

Mr. Licking: I have no objection to the first paragraph.

Mr. Peckham: The first paragraph you have no objection to.

The second paragraph:

“I knew William S. Godfrey, Jr., the insured in said policies in his lifetime, and at the time of the issuance of said policies and trust agreements, and had known him all his life, I also knew his wife, now his widow, Louise K. (for Krause) Godfrey, plaintiff in the above-entitled action”——.

Mr. Licking: I have no objection to the second paragraph. I don't see that it proves anything, but it is not prejudicial to anything.

Mr. Peckham: All right, no objection to that.

“Prior to April 24, 1924, at San Francisco, California, I sold to said William S. Godfrey a pol-

icy of [16] life insurance with said company on his life in the sum of \$15,000"—

Mr. Licking: It seems to me that is just encumbering the record. The policies are already in evidence.

Mr. Peckham: If the Court will bear with me, you had denials on information and belief, you see; this is trying to overcome. That paragraph you have no objection to. The fourth paragraph——

Mr. Licking: That is beginning on twenty?

Mr. Peckham: Line 20.

Mr. Licking: It seems to me clear as to that whole paragraph without your reading it, the Court just glancing at it, that the trust agreements are in evidence and that all that Mr. Rattenbury says was provided is invading the province of the Court and immaterial.

Mr. Peckham: Yes. Submit it, your Honor.

The Court: Sustained.

Mr. Peckham: "The trust agreements were prepared by me and were sent to the home office of said company for the company's execution and return.

"I informed Mr. Godfrey, the insured, that it would be necessary for his wife to sign her consent to the trusts on both originals and both duplicates.

"When we went to go home on Masonic Avenue, San Francisco, she did so sign her consent to the trust [17] agreements. At that time she said, in substance, that it was a splendid thing for Will

(the insured) to make this provision for his family, and to agree to keep up this policy intact for the protection of her and the children.”

Mr. Licking: It seems to me that is hearsay and irrelevant, “at that time she said in substance.”

Mr. Peckham: It is part of the act of finding.

The Court: Overruled.

Mr. Peckham: “I was not present at any agreements between Mr. Godfrey, the insured, or his wife, regarding the policy or the trust agreements, but Mr. Godfrey, the insured, always stated that it was his determination to keep up the policies intact for the protection of Mrs. Godfrey and the children. He so stated at the time I prepared and he signed said trust agreements.”

Mr. Licking: That, it seems to me, is entirely hearsay.

Mr. Peckham: If the Court please, that is where counsel and I differ. This is a declaration of a declarant as to his state of mind. The only person who can tell us that is the declarant himself.

The Court: Overruled.

Mr. Peckham: “He said nothing about surrender or assigning of policy, or changing beneficiary, or revoking the appointment of trustee, but such action was entirely inconsistent with his expressed intentions at the time.” [18]

Mr. Licking: That, of course, is argumentative.

The Court: It is a conclusion.

Mr. Licking: It should go out.

Mr. Peckham: That is out.

“I was also the agent who negotiated the sale to Mr. Godfrey of New York Life Policy Number 10,899,207. I sold that policy to him shortly prior to December 29, 1930, and on said date said company made executed and delivered, and I delivered personally said policy of insurance on his life for \$25,000 to Mr. Godfrey.

“Again I wrote the policy.

“In general, the same thing took place as to this policy, and again Mr. Godfrey ordered similar trust agreements in its proceeds.

“I prepared the trust agreements on or about February 24, 1930, and procured the signature of Mrs. Godfrey to the consent.

“Again, I was not present at any conversation between Mr. Godfrey and Mrs. Godfrey, as to any agreement between them as to the policy, but again Mr. Godfrey stated his determination to keep and keep up the policy intact for the protection of Mrs. Godfrey and the children.”

Mr. Licking: Now, as to that latter sentence, beginning with “but,” I have the same objection as heretofore, and I would like to have the Court reconsider the former ruling in [19] view of the sentence, now that the whole thing is together here, that he was never present at any time when there was any agreement between Mr. and Mrs. Godfrey.

The Court: Same ruling.

Mr. Peckham: “Again nothing was said by Mr. Godfrey about any assignment or surrender of the policy or changes of beneficiary therein.”

Mr. Licking: That should certainly go out.

The Court: Yes.

Mr. Peckham: "But such course was totally contrary to his expressed intention and concern."

I defer to his Honor's former ruling.

The Court: Same ruling.

Mr. Peckham: "This was particularly true as to the 1929 policy."

Mr. Licking: That also should go out.

The Court: Yes.

Mr. Peckham: "The great depression of that year had broken, attendance at his theaters had fallen off, Mr. Godfrey's business was unstable, Bill, Mr. Godfrey's son, was sickly, Mrs. Godfrey was in bad health, had to go to Arizona, Mr. Godfrey expressed great concern of the future of his business and the safety and security of his family and the education of his children in case anything happened to him. I can say absolutely, from [20] all his expressions to me at the time, that nothing was further from his mind than surrender or pledging his policies, changing his beneficiaries or revoking the appointments in the trust agreements."

Mr. Licking: I object to the whole of that paragraph just read on the ground it is an expression of hearsay.

The Court: Beginning with——

Mr. Peckham: Beginning with "the great depression"?

The Court: "This is particularly true of the

1929 policy." From there on the objection is sustained.

Mr. Peckham: In other words, all the circumstances on the depression and everything on that, your Honor is striking out?

The Court: Yes.

Mr. Peckham: And that the child was sick and Mrs. Godfrey——

The Court: I don't see that has anything to do with it.

Mr. Peckham: I think, your Honor, we are entitled to show the background under which these agreements were made to show the probability that he entered into such a contract. It is corroborative.

Mr. Licking: Corroborative of what?

Mr. Peckham: Of what Mrs. Godfrey will testify to in a few moments.

The Court: Well, there might be some materiality in the [21] fact that she was in poor health and the boy was sickly. The rest of it is purely conclusion, "I can say absolutely from all his expressions."

Mr. Peckham: What he said was a conclusion——

The Court: "I can say absolutely from all his expressions to me at the time that nothing was further from his mind" is absolutely a conclusion.

Mr. Peckham: I concede that.

The Court: That Mrs. Godfrey was in bad

health, I will permit that to stay in, but as to the rest of it the objection is sustained.

Mr. Peckham: "It was then his stated determination to keep the policies and keep them up intact for the protection of his wife and children."

Mr. Licking: Same objection.

The Court: Same ruling I made before.

Mr. Peckham: Out?

The Court: No, in.

Mr. Peckham: "At that time Mr. Godfrey said he was not going to change his beneficiaries or surrender or borrow on the policy, and Mrs. Godfrey said in Mr. Godfrey's presence that it was a wonderful thing for Bill to provide for her and the children in that way."

Mr. Licking: Same objection,—

The Court: Overruled. [22]

Mr. Licking: —I made before, it is immaterial.

The Court: Overruled.

Mr. Peckham: "There was some talk at the time of Mrs. Godfrey taking out a similar policy on her life for the protection of Mr. Godfrey and the children, but it never eventuated in a policy, and the state of her health and that of the boy was not such as to justify issuing a policy on her or the children."

Mr. Licking: What is the materiality of that? I object on the ground it is incompetent and immaterial, it has nothing to do with any possible issue in the case.

The Court: Sustained.

Mr. Peckham: "I have read the foregoing affidavit. I have also inspected my records and the records of the New York Life Insurance Company on the matter, and this affidavit states my best recollection at this time of the events it mentions. W. A. Rattenbury. Subscribed and sworn to before me"—the jurat.

I have offered the affidavit.

Mr. Licking: I suppose the stipulation, then, should be signed admitting the affidavit or just admit the affidavit on the present offer as changed by the Court's ruling.

Mr. Peckham: All the stipulations are subject to the Court's determination, and we will submit the affidavits subject to the Court's determination. [23]

(The affidavit referred to was marked Plaintiff's Exhibit I.)

## PLAINTIFF'S EXHIBIT I

District Court of the United States, Northern  
District of California, Southern Division

Civil Action No. 27659-G

LOUISE K. GODFREY,

Plaintiff,

vs.

JAMES G. SMITH, Collector

etc.,

Defendant.

AFFIDAVIT OF WITNESS AND  
STIPULATION

United States of America,  
Northern District of California,  
County of Solano—ss.

W. A. Rattenbury, being first duly sworn, says:

I am a citizen of the United States and of the State of California over the age of twenty-one (21) years and not a party to the above entitled action; that I reside and ever since prior to April 1, 1924, have resided continuously in Dixon, County of Solano in said state; that on April 1, 1924, I was, and ever since said date have been an agent for the sale of insurance of the New York Life Insurance Company, at all times herein mentioned a life insurance company incorporated in the State of New York; that at the dates of the issuance of the policies and trust agreements hereinafter mentioned I

had an office for taking care of my business for said company in the City of Sacramento, State of California.

I knew William S. Godfrey Jr., the insured in said policies in his lifetime, and at the time of the issuance of said policies and trust agreements, and had known him all his life, I also knew his wife, now his widow, Louise K. (for Krause) Godfrey, plaintiff in the above entitled action, at all said times. They had lived in Vacaville, California, for a long time, but at the times of the issuance of said policies and the making of said trust agreements they were living in San Francisco and down on the peninsula in San Mateo County, California.

Prior to April 24, 1924, at San Francisco, California, I sold to said William S. Godfrey, a policy of life insurance of said company on his life in the sum of \$15,000.00, and thereafter said company made, issued and delivered, and I delivered personally to said insured New York Life Policy Number 8751507, and said insured paid the premium therefor.

Thereafter said insured arranged to have two separate trusts erected in the proceeds of said policy, each covering one-half the proceeds of said policy, by the terms of which said company would pay an income from such half to said Louise Krause Godfrey for life, and after her death the balance of such proceeds to Norma Louise Godfrey, daughter of said insured, as to one half, and to William S. Godfrey, Jr., son of said insured, as to the other

half. I prepared said trust agreements at the insured's office in the Haight Theater in San Francisco, and then we went to his home, then on Masonic Ave., San Francisco to get his wife's signed consent thereto; the Superintendent of the Home Office of said company, had theretofore written the Sacramento Branch office of said company, that it would be necessary for the wife of the insured to sign her consent to the trusts on both originals and both duplicates.

The trust agreements were prepared by me and were sent to the Home office of said company for the Company's execution and return.

I informed Mr. Godfrey the insured that it would be necessary for his wife to sign her consent to the trusts on both originals and both duplicates.

When we went to the home on Masonic Avenue, San Francisco, she did so sign her consent to the trust agreements. At that time she said, in substance, that it was a splendid thing for Will (the insured) to make this provision for his family, and to agree to keep up this policy intact for the protection of her and the children.

I was not present at any agreements between Mr. Godfrey, the insured, or his wife, regarding the policy or the trust agreements, but Mr. Godfrey, the insured, always stated that it was his determination to keep up the policies intact for the protection of Mrs. Godfrey and the children. He so stated at the time I prepared and he signed, said trust agreements. He said nothing about surrender or

assigning of policy, or changing beneficiary, or revoking the appointment of trustee, but such action was entirely inconsistent with his expressed intentions at the time.

I was also the agent who negotiated the sale to Mr. Godfrey of New York Life Policy No. 10 899 287. I sold that policy to him shortly prior to December 29, 1930, and on said date said company made executed and delivered, and I delivered personally said policy of Insurance on his life for \$25,000.00 to Mr. Godfrey.

Again I wrote the policy.

In general, the same thing took place as to this policy, and again Mr. Godfrey ordered similar trust agreements in its proceeds.

I prepared the trust agreements on or about February 24, 1930, and procured the signature of Mrs. Godfrey to the consent.

Again, I was not present at any conversation between Mr. Godfrey and Mrs. Godfrey, as to any agreement between them as to the policy, but again Mr. Godfrey stated his determination to keep and keep up the policy intact for the protection of Mrs. Godfrey and the children. Again nothing was said by Mr. Godfrey about any assignment or surrender of the policy or changes of beneficiary therein, but such course was totally contrary to his expressed intention and concern. This was particularly true as to the 1929 policy. The great depression of that year had broken, attendance at his theaters had fallen off, Mr. Godfrey's business was unstable.

Bill, Mr. Godfrey's son was sickly, Mrs. Godfrey was in bad health, had to go to Arizona, and Mr. Godfrey expressed great concern at the future of his business, and the safety and security of his family and the education of his children in case anything happened to him. I can say absolutely, from all his expressions to me at the time that nothing was further from his mind than surrender or pledging his policies changing his beneficiaries or revoking the appointments in the trust agreements.

It was then, his stated determination to keep the policies, and keep them up intact for the protection of his wife and children.

At that time, Mr. Godfrey said he was not going to change his beneficiaries, or surrender or borrow on the policy, and Mrs. Godfrey said in Mr. Godfrey's presence that it was a wonderful thing for Bill to provide for her and the children in that way.

There was some talk at the time of Mrs. Godfrey taking out a similar policy on her life for the protection of Mr. Godfrey and the children, but it never eventuated in a policy, and the state of her health and that of the boy was not such as to justify issuing a policy on her or the children.

I have read the foregoing affidavit, I have also inspected my records and the records of the New York Life Insurance Company on the matter, and this affidavit states my best recollection at this time of the events it mentions.

/s/ W. A. RATTENBURY.

Subscribed and sworn to before me this 10th day of March, 1948.

[Seal] /s/ SINCLAIR M. DOBBINS,  
Notary Public in and for the County of Solano,  
State of California.

Stipulation

It is stipulated by the parties to the above entitled action that, if called, W. A. Rattenbury of Dixon, California, affiant in the foregoing affidavit, will give the same testimony as that given in the foregoing affidavit.

I. M. PECKHAM,  
Attorney for Plaintiff.  
FRANK J. HENNESSEY,  
U. S. Attorney,

By .....  
Assistant U. S. Attorney.

[Endorsed]: Filed April 9, 1948.

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LOUISE K. GODFREY

the plaintiff, called in her own behalf; sworn:

Direct Examination

By Mr. Peckham:

Q. Your name is Louise K. Godfrey?

A. Yes.

Q. You were the wife and are the widow of William S. Godfrey, Jr., deceased?      A. I am.

(Testimony of Louise B. Godfrey.)

Q. And you were such in 1924 and down to the date of his death? A. Yes.

Q. He died, did he not, in 1944?

A. November 6.

Q. November 6, 1944. And in 1924 do you recall the circumstances of his taking out the \$15,000 policy of insurance that is introduced in evidence here? A. Yes, sir.

Q. You tell us in your own words just what took place with regard to that policy.

A. Mr. Godfrey took out the policy——

Q. What?

A. Mr. Godfrey took out the policy and before the trust [24] agreements were signed or made, why, he said he thought it was best that there be a trust agreement so that there would be a monthly income for me during my life and for Norma and for Bill, our son and our daughter—our daughter and our son.

Q. At that time, did he ask you to join in the settlement of the proceeds in these trusts—in the trusts?

A. He said that the New York Life would require me to sign the trust agreement and that he would keep up the policies in their full value for the protection of us.

Q. What did you say to him? Did you tell him that you would join in the trust agreement?

A. I said I would sign the trust agreement if he would keep it up for the protection of the children.

(Testimony of Louise B. Godfrey.)

Q. Do you recall the precise words that were used between you at that time?

A. Just that I asked if he would keep them up in their entirety for our protection.

Q. And what did he say?

A. And he said that he would.

Q. And did you thereupon consent to the erection of the trust agreements in the proceeds?

A. Yes.

Q. And subsequently the trust agreements were brought to you by a Mr. Rattenbury, were they not, and you did sign the trust agreements? That is your signature that appears on the [25] trust agreement?

A. Yes. You showed that to me.

Q. The same occurred in regard to the trust agreement of 1930 also, didn't it?      A. Yes.

Q. The policy was issued in December of 1929 and sometime in February of 1930 the trust agreement was entered into?      A. Yes, sir.

Q. And what did he say to you in regard to that trust agreement?      A. I asked him——

Mr. Licking: Objected to as asked and answered. She said the same thing happened with reference to that, the same conversation as with reference to the first one.

The Court: Overruled.

A. What does that mean? He said that he thought the trust agreements were good for them to come in monthly installments again and I said

(Testimony of Louise B. Godfrey.)

that I would sign them if he would promise to keep them up or agreed to keep them up in their full—for their full face value. May I state something?

Q. (By Mr. Peckham): And what did he say to that?

A. And he said that he would keep them up.

Q. You wanted to add something to your answer?

A. This may be irregular, I don't know, but if anyone knows anything about the theatre business, why, the expenditures [26] of the theatres are very great and the investment is very great and usually one who has something must all the time make improvements and additions and definitely go forward and protect your own interests, and with each addition or each improvement why, usually if one does not have the money one borrows it or the company itself takes care of it, so any expenditures of the theatre are always taken care of from the income of the theatre itself, and our expenditures at the time in 1930 were pretty big because we had acquired the property and theatres of the North Beach—the Wigwam Theatre and also the Lane Theatre in the Irving District. So Mr. Godfrey was thinking at the time and that additional expense was particularly great in the theatres themselves and he thought of that, and there was quite a few thousand dollars owing at that time, but we knew that the income from the theatres would eventually take care of that, because the bank makes that ar-

(Testimony of Louise B. Godfrey.)

rangement itself. But for the personal upkeep of the family that was more or less an effort and that was one of the reasons that we talked it over and he and I both thought that would be the thing.

I may be irregular in saying that.

Q. The Court wants all that.

The Court: Theatre management was discussed with him at the time?

A. With Mr. Godfrey? He knew of that information, but I was just telling it so you might know. [27]

Q. (By Mr. Peckham): At the time the policies were taken out you and Mr. Godfrey had two children? A. Yes.

Q. One was Bill, the third, and one was Norma Godfrey? A. Yes.

Q. When was Bill born?

A. March 18, 1918.

Q. When was Norma born?

A. October 25, 1919.

Q. At the time this policy was issued Mr. Godfrey had just entered the theatre business in San Francisco, had he not?

A. No, sir, he entered the theatre business in 1916 in San Francisco.

Q. I was under the impression it was about that time. A. No, sir.

Q. In 1929 did the theatre suffer from the depression that was going on then?

A. Yes, sir.

(Testimony of Louise B. Godfrey.)

Q. In what way?

A. Well, falling off of attendance.

Mr. Licking: If the Court please, this seems to be entirely immaterial whether the theatre suffered from the depression or not. The same matter of the depression has been passed on by the Court in the affidavit, it is immaterial.

Mr. Peckham: I think it is material concerning the [28] making of the second contract.

The Court: I think I permitted that to remain in, the physical conditions. Overruled.

Q. (By Mr. Peckham): At the time the contract of 1929 was made, were you living in San Francisco?

A. Well, we went to Arizona in September of 1929.

Q. Why did you have to go to Arizona?

A. On account of my health and my son's.

Q. On account of your health and the health of your son, Bill? A. Yes.

Q. And Mr. Godfrey knew about that condition?

A. Yes.

Q. He visited you from time to time down in Arizona, did he not?

A. Yes. He lived there part of the time?

Q. What?

A. He lived there part of the time and then he would just visit.

Q. After the making of these contracts of insurance, did Mr. Godfrey pay all the premiums on them up to the time of his disablement?

(Testimony of Louise B. Godfrey.)

A. Yes.

Q. And he became disabled in the summer of 1937? A. Yes. [29]

Q. And you were appointed his guardian at that time? A. Yes.

Q. As the record shows here? A. Yes.

Q. And conducted the guardianship up to the time of his death and handled all matters of the guardianship up to the time of his death?

A. Yes.

Q. And he died, as you gave the date, November 6, 1944, and his will was admitted to probate and you were appointed executrix and the estate was distributed under the will and you were discharged?

A. Yes.

Q. You directed the putting in of these protests, signed both of them yourself— A. Yes.

Q. —at the time they were put in. During the time these policies were in effect Mr. Godfrey never borrowed on them, did he? A. No, sir.

Q. And he never attempted to assign the policies otherwise than in this agreement with you?

A. No, sir.

Q. The policies were in fact kept up in full force and effect until his death? A. Yes, sir.

Mr. Peckham: I think that is all. You may cross examine.

Mr. Licking: I have no questions.

Mr. Peckham: That is all. That is the plaintiff's case, your Honor.

Mr. Licking: If the Court please, I would like to make a motion and now renew all my objections to this parol evidence outside the trust agreements and move at this time to strike the evidence along that line which has been admitted by the Court, as having no bearing on the question involved, which is whether or not the trust agreements, being revocable, the designation of beneficiary being at the option, that so far as the United States and the taxpayer are concerned any outside agreement is immaterial and irrelevant, whatever might be the case if a third party were asserting claims contrary to the claim now asserted by the taxpayer.

The Court has already passed on the matter. I assume the Court will reserve a ruling on that evidence.

The Court: Well, there is always involved the legal sufficiency of evidence in support of a claim of a plaintiff. It is necessary in the final analysis to encompass the very objections that you are raising, so at this point the motion is denied.

Mr. Peckham: Now, if the Court please, unfortunately there is no precise ruling on this point anywhere in the books——

The Court: Do counsel wish to brief it? [31]

Mr. Peckham: What?

The Court: Do counsel wish to brief it?

Mr. Peckham: I think we will have to, your Honor. There are a number of cases——

The Court: You rest, do you, Mr. Licking?

Mr. Licking: Yes, the evidence is in, the return and the assessment.

The Court: What is counsel's pleasure as to the time?

(Discussion as to briefs, and the matter was ordered submitted on briefs thirty, thirty, and twenty.)

### CERTIFICATE OF REPORTER

I, Clarence F. Wight, official reporter, certify that the foregoing 32 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.



[Endorsed]: No. 12277. United States Court of Appeals for the Ninth Circuit. Louise K. Godfrey, Appellant, vs. James G. Smyth, United States Collector of Internal Revenue at San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 23, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12277

LOUISE K. GODFREY,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of  
Internal Revenue,

Appellee.

STATEMENT OF POINTS AND  
DESIGNATION OF RECORD

To the Clerk of the United States Court of Appeals  
for the Ninth Circuit, and to the attorneys for  
appellee:

In accordance with the provisions of Rule 19,  
subdivision 6, of the Rules of Practice of the above  
entitled court, the appellant, Louise K. Godfrey,  
files this Statement of Points and Designation of  
Record on Appeal on her appeal in the above en-  
titled cause:

1. Appellant adopts on this appeal the State-  
ment of Points on Appeal filed with the Clerk of  
the trial court, as incorporated in the Record on  
Appeal;

2. Appellant desires to have printed the entire  
record, subject to any order of the above entitled  
court dispensing with the reproduction or printing

of exhibits and providing for the consideration of the originals.

Dated, San Francisco, June 24, 1949.

/s/ I. M. PECKHAM,

Attorney for Appellant Louise  
K. Godfrey.

Copy of the foregoing Statement of Points and Designation of Record received this 24th day of June, 1949.

/s/ FRANK J. HENNESSY,  
U. S. Attorney.



No. 12,277

IN THE

United States Court of Appeals  
For the Ninth Circuit

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LOUISE K. GODFREY,

*Appellant,*

VS.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue at San  
Francisco, California,

*Appellee.*

BRIEF FOR APPELLANT.

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I. M. PECKHAM,

400 Montgomery Street, San Francisco 4,

*Attorney for Appellant.*

FILED

SEP 20 1949

PAUL P. O'BRIEN, -  
CLERK



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No. 12,277

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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LOUISE K. GODFREY,

*Appellant,*

VS.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue at San  
Francisco, California,

*Appellee.*

---

**BRIEF FOR APPELLANT.**

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The appeal is by the plaintiff from an adverse judgment in her action to recover a federal estate tax paid under protest. R. 45. Plaintiff has also appealed from the order denying a motion to amend findings and judgment. R. 45.

---

**STATEMENT OF JURISDICTION.**

The action was against a Collector of Internal Revenue to recover taxes paid under protest. R. 2-11. The District Court had jurisdiction. 28 U.S.C.A., sec. 41 (5), now 28 U.S.C.A., sec. 1340. The judgment ap-

pealed from was entered January 24, 1949. R. 32. Plaintiff's motion for new trial, filed February 1, 1949, was denied May 2, 1949. R. 42-44. A motion to amend the findings and judgment was denied the same day. R. 42-44. Notice of appeal was filed May 27, 1949. R. 45. The appeal was timely taken, R. 45, and timely docketed, R. 135. Rules of Civil Procedure, Rule 73, (a) and (g). Under 28 U.S.C.A., secs. 1291, 1294, this Court has jurisdiction to review the judgment and order of the District Court.

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#### **STATEMENT OF THE CASE.**

William S. Godfrey, Jr., died testate at and resident of San Francisco in November of 1944. R. 24, 107-108. His widow, appellant Louise K. Godfrey, was named executrix in his last will, dated March 4, 1930, and as sole beneficiary thereunder. R. 24, 108-110. The estate was duly administered and distributed to appellant in July of 1945. R. 25, 102-105. At the time of his death, Mr. Godfrey was the insured under two policies of life insurance in the New York Life Insurance Company, aggregating \$40,000, payable to a trustee for the use and benefit of the widow and two children. R. 19-24. During the administration of the estate the taxing authorities collected and appellant paid, under protest, an estate tax thereon of \$10,088.90. R. 25-26. The present action was brought to obtain the refund thereof. R. 10-11. The question in the District Court and here is whether the proceeds of these life insurance policies were includible

in the gross estate of Mr. Godfrey for federal estate tax purposes. If they were, the judgment of the District Court is right and should be affirmed. If they were not, the judgment of the District Court is wrong and should be reversed. Photostatic copies of the two policies involved were admitted in evidence at the trial and are reproduced in the record. R. 55-61, 66-70A.

The first policy was No. 8751507 for \$15,000. R. 55. The insurer was New York Life Insurance Company. R. 55. The insured was William S. Godfrey, Jr. R. 55. He was then 36 years of age. R. 55. It was dated May 9, 1924, R. 55, but was effective as of April 24, 1924, R. 55. The beneficiary was designated as "the Executors, Administrators or Assigns of the insured or to the duly designated Beneficiary (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 7)". R. 55. Said Section 7 provided: "Change of Beneficiary.—The insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment

made by it before such indorsement. In the event of the death of any beneficiary, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein". R. 60. The policy also extended to the insured coverage against total and permanent disability and provided for disability benefits and waiver of all premiums under the policy in the event of such casualty. R. 55, 57.

Two trust agreements, dated June 5, 1924, and executed by the insurer as trustor, accepted by the insurer as trustee, and consented to by appellant as "wife of the insured", were annexed to the policy. R. 53-54. One appointed the insurer trustee of one-half of the proceeds of the policy, receivable on the death of the insured in trust for appellant as First Beneficiary, and payable to her in designated monthly instalments or, in the event of appellant's death, in like manner to Norma Louise Godfrey, daughter of the insurer and appellant, as Second Beneficiary. R. 53. It was also provided: "In the event of the death of both Beneficiaries said Company, as Trustee, shall pay any balance of said one-half of the proceeds remaining in its possession, to the Executors or Administrators of the last surviving Beneficiary in one sum". R. 53. Another provision was as follows: "If said Company accepts this Trust, this appointment and the Trust shall become null and void (a) if I shall revoke said appointment by written notice to said Company filed at its Home Office; (b) if I shall survive both said beneficiaries; (c) if any change be made in the beneficiary or manner of payment of the proceeds of

said policy; (d) if said policy shall be surrendered for cash surrender value; (e) if at my death the net sum payable under said policy shall be less than Four Thousand Dollars; (f) if I shall assign said policy and said assignment or written notice thereof be filed with the Company at its Home Office." R. 53. The other trust agreement was of corresponding date, form, and contents, but had reference to the other one-half of the proceeds of the policy and the Second Beneficiary was William Sherman Godfrey Jr., son of insured and appellant. R. 56.

The second policy was No. 10899287 for \$25,000. R. 66. The insurer was New York Life Insurance Company. R. 66. The insured was William S. Godfrey, Jr. R. 66. He was then 41 years of age. R. 66. It was dated December 21, 1929, but was effective as of December 9, 1929. R. 66. The beneficiary was designated as "the Executors, Administrators or Assigns of the insured, or to the duly designated Beneficiary (with right on the part of the insured to change the Beneficiary in the manner provided herein)". R. 66. The policy contained no provision, however, respecting manner of change of beneficiary. In the subdivision entitled "Other Provisions", it merely provided a ruled space with the heading "Register of Change of Beneficiary", accompanied by a note "No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office", and appropriate columns for "Date of Request", "Beneficiary", and "Indorsed by". R. 28, 69. The policy also extended to the insured coverage against total and

permanent disability and provided for disability benefits and waiver of all premiums under the policy in the event of such casualty. R. 66-67.

Two trust agreements, dated February 24, 1930, and executed by the insurer as trustor, accepted by the insurer as trustee, and consented to by appellant as wife of the insured, were annexed to the policy. R. 64-65. In form and contents they substantially corresponded in all material respects to the trust agreements previously mentioned and quoted. R. 64-65.

The insured and appellant were married in 1916. R. 28. Their son William was born in 1918; their daughter Norma in 1919. R. 131. All premiums on the said policies were paid with the community funds of the insured and appellant. R. 29. In 1937, the insured became totally and permanently disabled, and was adjudged an incompetent person and appellant was appointed guardian of his person and estate. R. 24, 98-100. Thereafter, no premiums were paid for said life insurance policies and under the terms thereof no premiums were to be paid. R. 24. The disability of the insured continued until his death in November of 1944. R. 24.

Appellant consented to each trust agreement above mentioned on the oral agreement and understanding with her husband, the insured, that he would always keep up intact and in full force and effect for the benefit and protection of appellant and the children the life insurance policy to which the trust agreement referred and was annexed, and that he would see that

the premium payments on each said policy were kept up and that she and the children would be the beneficiaries thereunder. R. 19, 22.

In the federal estate tax return made by appellant in her husband's estate she did not include in the gross estate the proceeds of said life insurance policies. R. 25. The taxing authorities held they were includible in the gross estate and collected \$10,088.90 thereon, and appellant paid that sum under appropriate protest and claim of refund. R. 25-26.

The findings of fact made by the District Court are in accord with the facts above stated. R. 18-29. But other findings are adverse to appellant and are challenged by specifications of error herein as lacking evidentiary support and as being contrary to the evidence. These challenged findings (No. III, R. 19-20; No. VIII, R. 21-22; No. XVII, R. 26-27) will be quoted later, but their general effect was that the agreement and understanding between appellant and her husband respecting the trust agreements did not amount to a contract, did not thereby transfer to appellant and her children the whole beneficial interest in the policies of insurance, did not destroy the community character of the property of the insured and his wife in said policies, and that the proceeds of said policies were includible in the gross estate of the husband for federal tax purposes and had been properly taxed. The six conclusions of law, later quoted, drawn by the court from the findings of fact were adverse to appellant, R. 29-30, are challenged by appellant as contrary to law and each is the subject of a separate

specification of error herein. After judgment was entered, appellant made a motion to amend the findings, conclusions of law, and judgment to accord with the facts and the law, and appellant also moved for a new trial. R. 32-42. A specification of error is addressed to the denial of each of these motions.

---

### **SPECIFICATIONS OF ERROR.**

1. The District Court erred in finding that the agreement and understanding between appellant and her husband respecting the trust agreements annexed to the \$15,000 policy was not a contract and did not thereby transfer to appellant and her children the whole beneficial interest in said policy or destroy the community character of the property of the insured and his wife in the policy, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

2. The District Court erred in finding that the agreement and understanding between appellant and her husband respecting the trust agreements annexed to the \$25,000 policy was not a contract and did not thereby transfer to appellant and her children the whole beneficial interest in said policy or destroy the community character of the property of the insured and his wife in the policy, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

3. The District Court erred in finding that the proceeds of the insurance policies were includible in the gross estate of the husband for federal estate tax purpose and had been properly taxed, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

4. The District Court erred in concluding as a matter of law that decedent insured retained the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies 8751507 and 10899287 or the proceeds thereof, for the reason that the conclusion is contrary to the law and the evidence.

5. The District Court erred in concluding as a matter of law that the insured, as manager of the community of himself and plaintiff, at his death possessed incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code as amended by Section 404 of the Revenue Act of 1942, for the reason that the conclusion is contrary to the law and the evidence.

6. The District Court erred in concluding as a matter of law that defendant as collector and the Commissioner of Internal Revenue properly included \$40,000.00, representing the proceeds of said policies, in the estate of said insured for Federal Estate Tax purposes, for the reason that the conclusion is contrary to the law and the evidence.

7. The District Court erred in concluding as a matter of law that plaintiff did not over-pay the

Federal Estate Taxes on the estate of said insured, for the reason that the conclusion is contrary to the law and the evidence.

8. The District Court erred in concluding as a matter of law that there was no over-payment of the Federal Estate Tax on the Estate of William S. Godfrey, Jr., deceased, for the reason that the conclusion is contrary to the law and the evidence.

9. The District Court erred in concluding as a matter of law that defendant is entitled to judgment against plaintiff for his costs to be taxed, for the reason that the conclusion is contrary to the law and the evidence.

10. The District Court erred in denying appellant's motion to amend the findings of fact, conclusions of law, and judgment.

11. The District Court erred in denying appellant's motion for a new trial.

---

## **ARGUMENT.**

### **SUMMARY OF ARGUMENT.**

The determinative question here is whether the proceeds of the two life insurance policies were includible in the gross estate of the insured for federal estate tax purposes. The District Court answered that question in the affirmative. The insured died in 1944 and the Revenue Act of 1942 controls. Under that Act, the determinative question must be answered in the negative if the insured did not possess at the time

of his death an incident of ownership to the policies upon his life. The record establishes that at the time of his death the insured did not possess any such incident, for he had waived and relinquished all incidents of ownership to the policies and had transferred them to his wife and children for good consideration. The judgment of the District Court is erroneous and should be reversed. The motion for new trial and the motion to amend the findings, conclusions of law, and judgment were erroneously denied.

- 
1. **THE PROCEEDS OF THE LIFE INSURANCE POLICIES WERE NOT INCLUDIBLE IN THE GROSS ESTATE OF THE INSURED FOR FEDERAL ESTATE TAX PURPOSES, FOR THE REASON THAT THE INSURED HAD WAIVED AND RELINQUISHED ALL INCIDENTS OF OWNERSHIP TO THE POLICIES UPON HIS LIFE AND HAD TRANSFERRED THEM TO HIS WIFE AND CHILDREN FOR GOOD CONSIDERATION. (Specifications of Error, Nos. 1, 2, 3.)**

The insured died in 1944. R. 24. He had been totally and permanently disabled and an adjudged incompetent person since 1937. R. 24. By reason of waiver stipulations in the policies applicable to such status and its continuance no premiums for the life insurance were thereafter payable or paid. R. 24. The Revenue Act of 1942 controls. Pertinent provisions of that Act respecting the includibility of the proceeds of life insurance for federal estate tax purposes in the estate of a deceased insured, are as follows (26 U.S.C.A., Int. Rev. Acts Beginning 1940, pp. 332-333):

“Section 404. Proceeds of Life Insurance

(a) General rule. Section 811 (g) (relating to life insurance) is amended to read as follows:

‘(g) Proceeds of life insurance \* \* \*

‘(2) Receivable by other beneficiaries. To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money’s worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term “incident of ownership” does not include a reversionary interest.

‘(3) Transfer not a gift. The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4 or, in case the transfer was

made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

‘(4) Community property. For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term “incident of ownership” includes incidents of ownership possessed by the decedent at his death as manager of the community.’ \* \* \*

(c) Decedents to which amendments applicable. The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.’ ”

When the rules above quoted are applied to the facts of this case, it is very obvious that if the insured at the time of his death did not possess any incidents of ownership to the policies upon his life, the proceeds

of the policies were not includible in his gross estate for federal estate tax purposes, and the judgment of the District Court is wrong.

The record before the court establishes that at the time of his death the insured did not possess any such incidents, for he had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children for good consideration.

As to the policy for \$15,000, the District Court found (Finding No. III, R. 19-20):

“Referring to the allegations of paragraph III of plaintiff’s complaint, it is true that subsequent to the issuance of the policy No. 8751507 on April 24, 1924, decedent William S. Godfrey, Jr., requested plaintiff, then his wife, and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy mentioned in paragraph IV of plaintiff’s complaint, and plaintiff stated that she would do so and said decedent, William S. Godfrey, Jr., stated that he would always keep up said policy intact for the benefit and protection of plaintiff and her children. That at and before the signing by her of the consent to the trust agreement mentioned in plaintiff’s complaint, Mr. Godfrey stated to Mrs. Godfrey that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements. That at the time said discussion took place, the greatest bond of affection and confidence existed between the insured and his wife.

By the creation of the trust, the insured was seeking to make the best possible provision for his wife and his children. The trust had the effect of making the wife and children beneficiaries and of conserving the funds all for their benefit. *But the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policy was destroyed.*" (Emphasis added.)

To the extent that the above finding (No. III, R. 19-20) is emphasized, it is challenged by Specification of Error No. 1 as unsupported by the evidence and as contrary to the evidence and the law.

As to the policy for \$25,000, the District Court found (Finding No. VIII, R. 22-23):

"Referring to the allegations of paragraph VIII of said complaint, it is true that on February 24, 1930, insured requested plaintiff to consent to his entering into the trust agreement with the insurance company in the proceeds of policy No. 10899287 and that plaintiff stated that he might enter into such trust agreement and insured stated to plaintiff that he would keep up said policy intact and in full force and effect for

the benefit and protection of plaintiff and her children, and said insured then and there stated to plaintiff that he would see that the premium payments would be kept up and that she and her children would be the beneficiaries in the manner subsequently effected by the trust agreements, *but the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policies was destroyed.*" (Emphasis added.)

To the extent that the above finding No. VIII, R. 22-23) is emphasized, it is challenged by Specification of Error No. 2 as unsupported by the evidence and as contrary to the evidence and the law.

Unquestionably, each policy here involved was originally community property of the insured and his wife, the appellant. On each occasion that she consented to the creation of a trust in the proceeds of insurance upon his life she then had a vested interest as to one-half the insurance to be affected by the trust, and neither her husband nor the children could deprive her of that one-half interest or her right to dispose of it as she saw fit. (*Grimm v. Graham*, 26 Cal. 2d 173, 175, 157 P. 2d 841; *Wissner v. Wissner*,

89 A.C.A. 857, 861-864, 201 P. 2d 823; *Mazman v. Brown*, 12 Cal. App. 2d 272, 273, 53 P. 2d 539.) In turn, and originally, her husband also had a vested interest as to one-half of such insurance, and neither she nor the children could deprive him of that one-half interest or his right to dispose of it as he saw fit. (*Travelers Ins. Co. v. Fancker*, 219 Cal. 351, 356, 26 P. 2d 482.) But in California a husband and wife may freely and liberally deal with each other respecting property rights and by a very informal oral agreement and understanding transmute community property into separate property or from any other character to a different one. (*United States v. Pierotti*, 9 Cir. 1946, 154 F.2d 758; *Rogan v. Kammerdiner*, 9 Cir. 1944, 140 F.2d 569, 570; *Greenwood v. Com. Int. Rev.*, 9 Cir. 1943, 134 F.2d 914, 919-920; *Estate of Watkins*, 16 Cal. 2d 793, 797, 108 P.2d 417; *Estate of Raphael*, 91 A.C.A. 1079, 1085-1086, 206 P.2d 391.)

The facts found by the District Court unmistakably show that preceding the creation of each trust and the giving by the wife of her necessary consent thereto, it was orally agreed and understood by the spouses that the husband would maintain the insurance intact for the full amount and that the wife and children should always be and remain the beneficiaries thereunder. (Findings Nos. III and VIII, R. 19-20, 22-23.) The legal effect of this oral agreement and understanding was to transmute into the separate property of each spouse one-half the community insurance in order that a trust in that insurance be created for the benefit of the wife and children. It would be manifestly unjust to ignore such collateral agreement and under-

standing and to consider the trust agreement alone, and to assume and conclude as the District Court assumed and concluded, that the trust agreement merely served to divest the wife of her one-half interest in the insurance and confer upon the husband the unlimited right and power to dispose of the insurance as he saw fit to the exclusion of his wife and children. That assumption and conclusion, manifestly, is the equivalent of saying that the wife was to receive nothing in exchange for divesting herself of one-half the insurance or, in round figures, one-half of \$40,000. The obvious and just conclusion from the facts, of course, is that the oral agreement and understanding between the spouses collateral to the trust was a binding and enforceable agreement whereby the wife and children acquired an equitable interest, as beneficiaries of the insurance, which the husband was powerless to impair, divest, or destroy. (*Thompson v. Thompson*, 8 Cir. 1946, 151 F.2d 581, 585; *Dixon Lumber Co. v. Peacock*, 217 Cal. 415, 418, 19 P.2d 233; *Shoudy v. Shoudy*, 55 Cal. App. 344, 348, 203 P. 433.)

From the foregoing considerations it logically follows that the insured had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children, and that therefore the proceeds of the life insurance policies were not includible in his gross estate for federal estate tax purposes. (*Morse v. Com. Int. Rev.*, 7 Cir. 1938, 100 F.2d 593, 596; *Com. Int. Rev. v. Sharp*, 3 Cir. 1937, 91 F.2d 804, 805; *Helvering v. Parker*, 8 Cir. 1936, 84 F.2d 838, 839-840; *Pennsylv-*

*vania Co. etc. v. Com. Int. Rev.*, 3 Cir. 1935, 79 F.2d 295, 296-297.)

What has been said above respecting Specifications of Error Nos. 1 and 2 has equal application to Specification of Error No. 3 which challenged finding No. XVII (R. 26-27) as unsupported by the evidence and as contrary to the evidence and the law. The finding reads (R. 26-27):

“It is not true that by reason of inclusion of the proceeds of said two insurance policies the amount of the correct tax liability of said estate was not the sum of \$15,067.01, as stated in the report of the defendant collector; it is not true that there was no deficiency due said collector or that the total amount of said tax was only \$4988.01, or that the sum paid such collector is in excess of the proper amount of said tax or that there is now due, owing or unpaid from the United States of America to plaintiff the said sum of \$10,088.90, or any part thereof.”

- 
2. **THE DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT AT THE TIME OF HIS DEATH THE INSURED POSSESSED INCIDENTS OF OWNERSHIP TO THE POLICIES UPON HIS LIFE, THAT THE PROCEEDS THEREOF WERE PROPERLY INCLUDIBLE IN HIS GROSS ESTATE FOR FEDERAL ESTATE TAX PURPOSES, THAT PLAINTIFF WAS NOT ENTITLED TO JUDGMENT, AND THAT DEFENDANT WAS ENTITLED TO JUDGMENT FOR COSTS.** (Specifications of Error, Nos. 4, 5, 6, 7, 8, 9.)

Following the findings of fact the District Court made six conclusions of law adverse to plaintiff and summarized in the above heading. (R. 29-30). Each

said conclusion of law was challenged herein by a separate Specification of Error (Nos. 4-9) as contrary to the law and the evidence. It will be obvious to the court that arguments in support of these Specifications of Error would merely duplicate arguments made in the preceding subdivision. Appellant deemed it necessary to make separate Specifications of Error in order to comply with the rules of this court and to preserve her claims of error. She does not deem it necessary, however, to burden the court with repetition in argument.

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3. **THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT. (Specification of Error No. 10.)**

Appellant moved to set aside Findings Nos. III, VIII, and XVII, earlier quoted, to set aside the six conclusions of law, above discussed, to vacate the judgment, and to have other and different findings, conclusions, and judgment entered in lieu thereof. R. 33-41. In general, the motion sought to eliminate from Findings Nos. III and VIII the matters to which emphasis was added when the findings were quoted, to add a new finding (No. XA, R. 37) to the effect that the trust agreements transferred to plaintiff and her children the whole beneficial interest in the policies, to negative Finding No. XVII (R. 37-38), to negative the conclusions of law (R. 38-39), and to enter a judgment in favor of plaintiff (R. 40). The motion was denied. R. 42. Because the motion chal-

lenged the sufficiency of the evidence to support the judgment for defendant, a separate Specification of Error was addressed to the denial of the motion. And because the order of denial was made after judgment was entered, an appeal was specifically taken therefrom. R. 45. Additional arguments in support of Specification of Error No. 10 are unnecessary.

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**4. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL. (Specification of Error No. 11.)**

Appellant moved for a new trial on grounds raising the points covered by the other Specifications of Error (except Specification of Error No. 10) and the motion was denied. R. 33-34,44. Appellant is mindful that the granting or refusing of a new trial rests in the sound discretion of the trial court. But discretion may be abused. Here an abuse of discretion in denying the motion for new trial is plainly manifest.

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**CONCLUSION.**

Appellant respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco,  
September 19, 1949.

I. M. PECKHAM,  
*Attorney for Appellant.*



No. 12,277

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

LOUISE K. GODFREY,

*Appellant,*

VS.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue at San  
Francisco, California,

*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

---

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No. 12,277

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

LOUISE K. GODFREY,

*Appellant,*

vs.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue at San  
Francisco, California,

*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

**BRIEF FOR APPELLEE.**

---

**OPINION BELOW.**

The District Court did not write an opinion. Its findings of fact and conclusions of law (R. 18-30) are not officially reported. Its order denying the taxpayer's motion to amend findings and judgment and for a new trial (R. 42-44) is likewise unreported.

**JURISDICTION.**

This appeal involves estate taxes. The decedent died on November 6, 1944. (R. 24.) The estate taxes were paid as follows: \$10,786.15 on June 13, 1945 (R. 25); \$4,290.76 on November 27, 1945. (R. 26.) Of these taxes so paid, the sum of \$10,088.90 is in dispute. (R. 11.) Claim for refund was filed on December 3, 1945, and rejected on August 26, 1947. (R. 26, 77.) Within the time provided in Section 3772 of the Internal Revenue Code and on September 17, 1947, the appellant (hereinafter called the taxpayer) brought this action in the District Court for recovery of \$10,000 of the taxes alleged to have been illegally collected, naming both the United States and the Collector as defendants. (R. 2-10.) On November 25, 1947, the complaint was amended so as to omit the United States as a party defendant and to pray for judgment for the sum of \$10,088.90 together with interest and costs against the appellee, hereinafter called the Collector. (R. 11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Sec. 1340. The judgment was entered on January 24, 1949, dismissing the taxpayer's action with costs. (R. 30-32.) On February 1, 1949 the taxpayer filed a motion to amend the findings and judgment and for a new trial (R. 32-42) which the District Court denied on May 2, 1949. (R. 44.) Within sixty days and on May 27, 1949, the taxpayer filed a notice of appeal. (R. 45.) Jurisdiction is conferred upon this Court by 28 U.S.C., Sec. 1291.

**QUESTION PRESENTED.**

Whether the proceeds of two policies of insurance on the life of the decedent were properly included in his gross estate for purposes of the federal estate tax under Section 811 of the Internal Revenue Code.

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**STATUTES AND REGULATIONS INVOLVED.**

These are set out in the Appendix, *infra*.

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**STATEMENT.**

The District Court found the following facts (R. 18-29):

The plaintiff (hereinafter called the taxpayer) is the widow, was the executrix under the last Will and Testament of William S. Godfrey, Jr., deceased (hereinafter called the decedent), and his sole distributee under the Decree of Distribution in the matter of his estate. (R. 18.)

Defendant James G. Smyth is, and at the time of the payments of tax herein mentioned was United States Collector of Internal Revenue at San Francisco, California. (R. 18.)

April 24, 1924, the decedent took out a policy of life insurance on his life in the New York Life Insurance Company, numbered 8 751 507, in the sum of \$15,000 in favor of his executors, administrators, or

assigns or his duly designated beneficiary for an annual premium which he agreed to pay. (R. 19.)

Subsequently, the decedent requested taxpayer, then his wife and now his widow, to consent to the execution of a trust agreement in the proceeds of the policy, and taxpayer stated that she would do so and the decedent stated that he would always keep up the policy intact for the benefit and protection of taxpayer and her children. At and before the signing by her of the consent to the trust agreement, the decedent stated to taxpayer that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements. At the time the discussion took place, the greatest bond of affection and confidence existed between the insured and his wife. By the creation of the trust, the insured was seeking to make the best possible provision for his wife and his children. The trust had the effect of making the wife and children beneficiaries and of conserving the funds all for their benefit. But no contract existed nor was the community character of the property destroyed. Neither the decedent nor taxpayer intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to taxpayer and her children the whole beneficial interest in the policy or that the community character of the property of the insured and his wife in the policy was destroyed. (R. 19-20.)

Thereafter, on June 5, 1924, the decedent entered into a trust agreement with the insurance company by the terms whereof the company agreed to receive, as trustee, the proceeds of the policy and to pay one-half the proceeds and interest thereon, to taxpayer, the first beneficiary, if living, in monthly installments of \$50 each and, if she should die before the insured, to pay such one-half to the daughter of taxpayer, but if both of such beneficiaries died, then the money should be paid to the executors or administrators of the last surviving beneficiary. (R. 20-21.)

The decedent made a similar contract with the insurance company, whereby he appointed it trustee of the other half of the proceeds of the policy, and the company agreed to receive, as trustee, from itself as insurer, one-half of the proceeds of the policy, and to pay one-half of the proceeds and the interest thereon to taxpayer, as beneficiary, in monthly installments of \$50 each, and, in the event of the death of taxpayer before the insured, to pay such one-half to the son of taxpayer, and in the event of the death of both taxpayer and the son, to pay one-half of the proceeds to the executors or administrators of the last surviving beneficiary. (R. 21.)

The decedent always did keep the policy alive, intact and paid up for the protection of taxpayer and her children and paid the annual premiums thereon until he became disabled in 1937, after which the premiums were, by the terms of the policy, waived. (R. 21.)

On December 21, 1929, the decedent took out a further policy of life insurance with the New York Life Insurance Company numbered 10 899 287 in the sum of \$25,000, payable to the executors, administrators or assigns of the insured or his duly designated beneficiary, for an annual premium which the insured agreed to pay. (R. 21-22.)

On February 24, 1930, the insured requested taxpayer to consent to his entering into a trust agreement with the insurance company in the proceeds of policy No. 10 899 287 and taxpayer stated that he might enter into such trust agreement and insured stated to taxpayer that he would keep up the policy intact and in full force and effect for the benefit and protection of taxpayer and her children, and the insured then and there stated to taxpayer that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements, but no contract existed nor was the community character of the property destroyed. Neither the decedent nor taxpayer intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to taxpayer and her children the whole beneficial interest in the policy or that the community character of the property of the insured and his wife in the policy was destroyed. (R. 22-23.)

Thereafter on such date, the insured entered into a trust agreement with the insurance company by the terms whereof the insurance company agreed to receive one-half of the proceeds of the policy as trustee and to pay the funds so held and the interest credited thereon to taxpayer, as first beneficiary, at the rate of \$100 per month, and in case of the death of taxpayer to pay the balance of the fund, in like manner, to the daughter of taxpayer, and, in the event of the death of both taxpayer and the daughter, to the executors or administrators of the last surviving beneficiary. (R. 23.)

And in like manner, on that date, the insured and the insurance company entered into a similar agreement as to the other half of the proceeds of the policy whereby the insurance company agreed to receive the other half of the proceeds of such insurance as trustee, and to pay the same over to taxpayer, as beneficiary, in monthly installments of \$100 and in the event of taxpayer's death prior to the insured to pay the fund or any balance thereof, to the son of taxpayer, if living, and if both taxpayer and the son die, then to the executors or administrators of the last surviving beneficiary. (R. 23-24.)

The decedent kept up and maintained such policy intact and in full force and effect, paying all premiums thereon, until he became disabled in 1937, when pursuant to the terms of the policy, the premiums were thereafter waived. (R. 24.)

In 1937, after the decedent became disabled, taxpayer took out letters of Guardianship upon his person and estate. Thereafter, no premiums were paid, and under the terms of the contract no premiums should be paid. Such disability continued until the death of said deceased. (R. 24.)

On November 6, 1944, the decedent died, testate. Thereafter his will was admitted to probate and taxpayer was appointed executrix thereof, duly qualified as such, and ever since and up to Final Distribution and her discharge, remained the duly appointed, qualified and acting executrix of his will. (R. 24.)

By the terms of his will, the decedent left all his property, of every kind and character to taxpayer, and pursuant thereto all of his estate was duly distributed to her by Decree of Final Distribution. (R. 24.)

Taxpayer, as executrix, filed an estate tax return on the estate of the decedent and such return showed due to the United States Government by way of estate tax the sum of \$10,786.15. On June 13, 1945, taxpayer, as executrix, paid that sum to James G. Smyth, Collector. Thereafter, on July 30, 1945, the Superior Court of California, for the City and County of San Francisco, made its Decree of Settlement of First and Final Account and of Final Distribution in the matter of the estate of the decedent, by the terms whereof the entire estate was distributed to taxpayer and she ever since has been, and now is, the sole owner

thereof, including the claim for refund of estate tax here sued for. (R. 25.)

Thereafter, the probate Court made its order discharging taxpayer as executrix. (R. 25.)

On November 14, 1945, F. M. Harless, United States Internal Revenue Agent in Charge in San Francisco, California, made to taxpayer his report of examination of the estate tax return, indicating a deficiency of \$4,290.76 in estate taxes, and fixing the claimed correct tax liability at \$15,076.91 and on that date, taxpayer received from the Collector a notice of deficiency in the sum of \$4,290.76, and on November 27, 1945, she forthwith paid to such Collector the amount of the deficiency, under protest, first, because 50% of the community property, to-wit, the entire estate, should have been deducted; secondly, as to the \$40,000 of insurance, the insurance policy No. 8 751 507 for \$15,000 was covered by the two trust agreements, and the insurance policy No. 10 899 287 for \$25,000 was likewise covered by trust agreements. (R. 25-26.)

Immediately after payment of the deficiency, taxpayer filed with the Collector her claim for refund as to such taxes, and the claim for refund was referred to the Auditing Department and the Technical Staff of the Internal Revenue Department of the United States, and on August 26, 1947, such claim for refund was denied and rejected in its entirety. (R. 26.)

By reason of inclusion of the proceeds of the two insurance policies the amount of the correct tax liability of the estate was \$15,076.91, as stated in the re-

port of the agent; it is not true that there was no deficiency due or that the total amount of the tax was only \$4,988.01, or that the sum paid the Collector is in excess of the proper amount of the tax, or that there is now due, owing or unpaid from the United States of America to taxpayer the sum of \$10,088.90, or any part thereof. (R. 26-27.)

Policy No. 8 751 507 on the life of the insured provided that the insured might change the beneficiaries upon written notice to the home office of the insurer. In the event all beneficiaries should predecease the insured, the interest of the beneficiary was to vest in the insured. (R. 27.)

Each trust in one-half the proceeds of such policy provides that the trustee should receive from itself as insurer one-half of the proceeds of the policy in case it should become a claim because of the insured's death. Each trust named taxpayer as first beneficiary of the trust, and in the event of her death, the proceeds of the trust were to be paid in equal parts to the two children of insured and taxpayer. Each trust provided that it should become null and void if (a) the grantor revoked the appointment by written notice to the trustee; (b) the grantor should survive both beneficiaries; (c) if any change were made in the beneficiary or manner of payment of the proceeds of the policy; (d) if the policy should be surrendered for its cash surrender value; (e) if the net sum available under the policy at the time of the insured's death should be less than a certain sum; and (f) if the insured should assign the policy. (R. 27-28.)

As to policy No. 10 899 287, the policy did not provide on its face that insured might change the beneficiary in the manner provided in the policy. (R. 28.) As to change of beneficiary policy No. 10 899 287 reads (R. 28, 66) :

New York Life Insurance Company, a mutual company, agrees to pay to the executors, administrators or assigns of the insured, or to the duly designated beneficiary (with right on the part of the insured to change beneficiary in the manner provided herein) twenty-five thousand (\$25,000.00) dollars (the face of this policy), etc.

The only other reference to change of beneficiary in the policy was a ruled space at the end of its schedules labeled (R. 28, 69) :

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**REGISTER OF CHANGE OF BENEFICIARY**

NOTE—No change of beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office.

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Date of Request	Beneficiary	Indorsed by
On the 24th day of February, 1930, the New York Life Insurance Company was appointed trustee as per conditions of trust agreements (2) attached hereto.		John C. McCarthy, Vice President

Taxpayer married decedent insured September 4, 1916. They had two children, both still living. Taxpayer and insured resided and made their home in this district from their marriage to the death of insured November 6, 1944. All premiums of the policies were

paid with the community earnings of the insured and taxpayer. (R. 28-29.)

Upon the basis of the foregoing findings the District Court concluded as a matter of law that the \$40,000 proceeds of the policies was properly included in the decedent's estate for purposes of the federal estate tax (R. 29) and judgment was accordingly entered that the taxpayer take nothing by this action and the Collector have judgment for costs (R. 30-31). Thereafter the taxpayer made a motion to amend the findings and judgment and for a new trial (R. 32-42) which the District Court denied. (R. 42-44.) The taxpayer then took this appeal. (R. 45.)

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#### SUMMARY OF ARGUMENT.

The life insurance proceeds in question are plainly includible in the gross estate of the insured for purposes of the federal estate tax under Section 811 of the Internal Revenue Code, as amended by the Revenue Act of 1942. This is so because the premiums were all paid out of community property and the insured retained incidents of ownership in the policies and their proceeds. The taxpayer's contention that there was an oral agreement between the decedent and his wife to change the community insurance to separate property is without merit. Not only would such an agreement be repugnant to the terms of the trust agreements that were executed by the decedent with the consent of his wife, but the record affords no ade-

quate basis for concluding that any such agreement was made. Moreover, if there had been such an arrangement it would not affect the result in the instant case because the decedent had incidents of ownership in all of the policies exercisable either alone or in conjunction with his wife. In the circumstances we submit that the District Court made no error in deciding this case in the Government's favor and holding that the proceeds of the policies are includible in the decedent's gross estate under Section 811(g) of the Internal Revenue Code, as amended.

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#### **ARGUMENT.**

**THE INSURANCE PROCEEDS IN QUESTION WERE PROPERLY INCLUDED IN THE GROSS ESTATE UNDER SECTION 811 OF THE INTERNAL REVENUE CODE.**

Although the District Court did not write a formal opinion, still it made conclusions of law (R. 29-30), and also expressed its views to some extent at least in a memorandum accompanying the order denying the taxpayer's motion to amend the findings and judgment and for a new trial. See R. 42-44. In that memorandum the District Court pointed out (R. 43) that under the express terms of each of the trust agreements the trust was to be null and void.

- (a) if I shall revoke said appointment by written notice to said Company filed at its Home Office;
- (b) if both said Beneficiaries shall die before me;
- (c) if any change is made in the beneficiary or manner of payment of the proceeds of said policy;

(d) if said policy shall be surrendered for Cash Surrender Value; (e) if I shall assign said policy and said assignment or written notice thereof be filed with the Company at its Home Office; (f) if at my death the net sum payable under said policy shall be less than [a certain amount].

And the District Court went on to say that it is quite clear that the trust agreements to which taxpayer gave her written consent recognized that the decedent

retained the right to assign the policy and to revoke the appointment, and \* \* \* the right \* \* \* to change the beneficiary or manner of payment of proceeds and to surrender the policy for its cash value.

These are certainly substantial incidents of ownership (*Chase Nat. Bank v. United States*, 278 U. S. 327, 335; *Helvering v. Hallock*, 309 U. S. 106; Paul, Federal Estate and Gift Taxation, 1946 Supp., Sec. 10.37) and we do not understand that taxpayer is contending otherwise. However, the taxpayer contended below and here again urges (Br. 17) that there was an oral agreement between the decedent and his wife to transmute into the separate property of each spouse one-half the community insurance. In that connection the District Court took the view, correctly we submit (R. 44), that the "original negotiations merged in the writing and any verbal negotiations repugnant to the writing may not be considered"; and therefore the insurance proceeds were includible in the gross estate under Section 811(g) of the Internal Revenue Code,

as amended by Section 404 of the Revenue Act of 1942 (Appendix, *infra*).

Section 811(g), as so amended, provides for the inclusion of life insurance proceeds to the extent of the amount receivable by the executor; and to the extent of the amount receivable by all other beneficiaries where the insurance was purchased with premiums paid by the decedent or with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of the statute, premiums paid with community property are considered to have been paid by the insured, with exceptions not material here; and the term "incidents of ownership" includes incidents of ownership possessed by the decedent at his death as manager of the community. The law as so amended is applicable to estates of decedents dying after the date of enactment of the Act (October 21, 1942); but in determining the proportion of the premiums paid by the decedent the amount so paid on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.<sup>1</sup>

Here the decedent died in 1944, and there is no question but that all the premiums were paid prior to January 10, 1941, by the decedent out of community property and therefore if as held by the District Court

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<sup>1</sup>It is unnecessary here to consider the changes made by Section 351 of the Revenue Act of 1948, which are effective only with respect to estates of decedents dying after December 31, 1947.

and contended by us he retained incidents of ownership in the policies after that date, then the proceeds are plainly includible in the gross estate under the statute.

In *Fernandez v. Wiener*, 326 U. S. 340, the Court upheld the constitutionality of the statute and its related provision (Section 811(e)(2) of the Internal Revenue Code, as amended by Section 402 of the Revenue Act of 1942 [Appendix, *infra*]); and in consequence the entire community property there involved (including insurance proceeds) was subjected to estate tax upon the death of the husband. In so holding, the Court rejected the contention that the wife's vested half interest was immune from inclusion in the husband's gross estate, and took the view that the cessation of the husband's extensive powers as manager of the community, and the establishment in the wife of new powers of control over her share, though it was always hers, furnished appropriate occasions for the tax.

It follows from the foregoing that if the District Court below correctly held that the alleged oral agreement may not be considered, then there is no doubt as to the tax in this case. In this connection the decision of the District Court is supported by cases holding that the parol evidence rule precludes consideration of evidence such as offered here which would contradict the express provisions of the trust agreements.

Thus, in *Pugh v. Commissioner*, 49 F. (2d) 76 (C.A. 5th), certiorari denied, 284 U. S. 642, the Court said (p. 79):

While it is sometimes broadly stated that the parol evidence rule has no application to any save parties to the instrument and their privies, *In re Shields Brothers*, 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061; *O'Shea v. N. Y. R. R. Co.* (C. C. A.), 105 F. 559; *Blake v. Hall*, 19 La. Ann. 49, yet when an instrument is executed as the final embodiment of an agreement, and becomes the act of the parties, and where the parol evidence is offered merely to vary the legal effect of its terms, the rule operates to protect all whose rights depend upon the instrument though not parties to it. *Allen v. Ruland*, 79 Conn. 405, 65 A. 138, 118 Am. St. Rep. 146, 8 Ann. Cas. and note, page 347; 10 R. C. L. § 213; 5 Wigmore on Evidence, §§ 2425, 2446; 2 Williston on Contracts, § 647. Especially are recorded muniments of title not to be altered by parol evidence except on orderly procedure for their reformation. *Blum v. Allen*, 145 La. 71, 81 So. 760. That by some other form of instrument the rights of the United States would have been different is beside the question. The parties abide by this instrument as they made it. The law, and not their wish or understanding, must control its legal effect on the incidence of taxation. The Board did not err in disregarding the parol evidence.

And the *Pugh* case was approved and followed by this Court in *Jurs v. Commissioner*, 147 F. (2d) 805, 810. See also *Grace Bros. v. Commissioner*, 173 F. (2d) 170, 175, where this Court said:

Before elaborating further on the matter, we advert to the fact that in the written documents which relate to the transaction, both before and after its consummation, no mention *whatsoever is made of the good will*. We leave aside, for the moment, the indisputable proposition that oral testimony contradicting written instruments can have no binding effect, in cases of this character. Cf. *Woodall v. Commissioner*, 9 Cir. 1939, 105 F. 2d 474, 478; *Jurs v. Commissioner*, 9 Cir. 1945, 147 F. 2d 805, 810; *Gaylord v. Commissioner*, 9 Cir., 1946, 153 F. 2d 408, 415. And see *Helvering v. Coleman-Gilbert Associates*, 1935, 296 U.S. 369, 374, 56 S. Ct. 285, 80 L. Ed. 278; *Titus v. United States*, 10 Cir., 1945, 150 F. 2d 508, 511, 162 A.L.R. 991.

Cf. *Miller v. Brode*, 186 Cal. 409; *Odone v. Marzocchi*, 89 A.C.A. 126, 131.

In the light of the foregoing considerations we submit that the Court below committed no error in deciding this case as it did and holding that the insurance proceeds in question are properly includible in the gross estate under Section 811(g) of the Internal Revenue Code, as amended. *Fernandez v. Wiener*, *supra*.

Moreover, the proceeds would also be includible in the gross estate under Section 811(c) of the Internal Revenue Code, as supplemented by Section 811(d)(5) (Appendix, *infra*), as a transfer intended to take effect in possession or enjoyment at or after the grantor's death. The policies were transferred in trust by the decedent and he retained an interest in the

transferred property sufficient to support the tax. *Reinecke v. Northern Trust Co.*, 278 U. S. 339; *Helvering v. Hallock*, *supra*; *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Fields*, 324 U. S. 113; *Goldstone v. United States*, 325 U. S. 687; *Commissioner v. Estate of Church*, 335 U. S. 632; *Estate of Spiegel v. Commissioner*, 335 U.S. 701; *Commissioner v. Bank of California*, 155 F. 2d 1 (C. A. 9th), certiorari denied, 329 U. S. 725; *In re Rhodes' Estate*, 174 F. (2d) 584 (C. A. 3d); Treasury Regulations 105, Section 81.17, as amended (Appendix, *infra*); I Paul, Federal Estate and Gift Taxation (1942) and 1946 Supplement, Section 7.08.

The proceeds would also be includible in the gross estate under Section 811(d)(2) of the Internal Revenue Code, as supplemented by Section 811(d)(5) (Appendix, *infra*), which provides for taxation where the enjoyment of the property was subject at the date of the grantor's death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke. *Commissioner v. Estate of Holmes*, 326 U. S. 480; *Porter v. Commissioner*, 288 U. S. 436; *Helvering v. City Bank Co.*, 296 U. S. 85; Treasury Regulations 105, Section 81.20; I Paul, Federal Estate and Gift Taxation (1942) and 1946 Supplement, Section 7.09.

The taxpayer says (Br. 16-17) that each policy here involved was originally community property and on each occasion when the wife consented to the creation of a trust she then had a vested interest in one-half the property. While we do not think that this makes

any difference here, still we would point out that some of the transactions in question took place prior to July 29, 1927, and there was a change in the California community property law as of that date. As to community property acquired prior to July 29, 1927, the wife had a mere expectancy; as to community property acquired on and after that date, her interest was "present, existing and equal." The law as to this was recently considered by this Court in *Rickenberg v. Commissioner*, decided August 22, 1949, and no extended discussion is necessary here.

Taxpayer cites (Br. 16-17) cases such as *Grimm v. Graham*, 26 Cal. (2d) 173, 175, which reiterates the long established rule that the husband can not make a valid gift of community property without the consent of his wife and if he undertakes to do so the transaction is voidable as to the wife's share. But this does not mean that he has none of the incidents of ownership in the property within the meaning of the estate tax law, and it is clear that he has. He can make a sale or transfer of community property for a consideration and the property may be subjected to the payment of his personal debts. See *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497; *Grolemund v. Caferata*, 17 Cal. (2d) 679, 688, certiorari denied, 314 U.S. 612; *Estate of Coffee*, 19 Cal. (2d) 248, 252; *Stratton v. Superior Court*, 87 Cal. App. (2d) 809, 811. And the statute (Section 811 (g)(4) of the Internal Revenue Code, as amended, *supra*) expressly provides with reference to community property that the term "incidents of ownership" includes incidents

of ownership possessed by the decedent as manager of the community. And see Paul, Federal Estate and Gift Taxation, 1946 Supplement, Section 10.40, p. 378.

We recognize of course that in California a husband and wife may by agreement change community property to separate property (*Rickenberg v. Commissioner, supra*) but here there was no such agreement, and even if there had been one it would not affect the tax in this case because the husband had incidents of ownership in all of the policies, exercisable either alone or in conjunction with the wife.

Moreover, even if it be assumed *arguendo* that there was such a division of property in the instant case that husband and wife each owned one-half as separate property and the decedent had no incidents of ownership at all in the wife's share, still it would not follow that all of the proceeds would be excludible and one-half of them would of course be includible in the gross estate. Cf. *Rule v. United States*, 63 F. Supp. 351 (C. Cls.).

However, we do not mean to intimate that there was any change from community to separate property in the instant case. The record affords no adequate basis for such a conclusion. Indeed, taxpayer does not point to any specific agreement for such a change and she merely urges (Br. 17) that the husband's statement that he would keep up the insurance for her and the children (R. 19) had the legal effect of transmuting into the separate property of

each spouse one-half of the community insurance. Also (Br. 18) that as a result of that agreement and the transfers in trust to which it was collateral, the wife and children acquired an equitable interest which the insured could not have destroyed. Taxpayer attempts to bolster her contentions by citing (Br. 17) cases such as *United States v. Pierotti*, 154 F. (2d) 758 (C.A. 9th), in support of the proposition that a change from community to separate property may be effectuated by a very informal oral agreement.

Whatever may be the scope of the *Pierotti* case and others like it, we do not understand that they were intended to override the parol evidence rule in circumstances like we have here; but even if it be thought, contrary to our views and the holding of the District Court, that evidence of the alleged oral agreement should be considered, still the result would not be changed. Of course the taxpayer has the burden of proof (*Greenwood v. Commissioner*, 134 F. (2d) 915, 919 (C.A. 9th)), and we submit that the record in the instant case would not justify the District Court in concluding that there was any agreement to change from community to separate property.

At most, the alleged oral agreement would be merely one to keep up the insurance for the wife and children, and certainly that would not be inconsistent with the retention by the decedent of a reversionary interest in the property. Each of the trust agreements in the instant case expressly provided (R. 43) that the trust should be null and void if the beneficiaries

died before the insured so that if he had survived them he would have regained complete control of the insurance. And it is settled that such an interest is an incident of ownership sufficient to support taxation. *Commissioner v. Estate of Church, supra; Estate of Spiegel v. Commissioner, supra; Fidelity Co. v. Rothensies, supra; Commissioner v. Estate of Field, supra; Hock v. Commissioner, 152 F. (2d) 574 (C.A. 8th); Liebman v. Hassett, 148 F. (2d) 247 (C.A. 1st); Schongalla v. Hickey, 149 F. (2d) 687 (C.A. 2d), certiorari denied, 326 U. S. 736; Chase Nat. Bank v. United States, 116 F. (2d) 625 (C.A. 2d.)*<sup>2</sup>

However, we do not have to place our sole reliance upon the retention of a reversionary interest here, for as shown above and in the order of the District Court, there can be no question but that the decedent also retained other valuable incidents of ownership in the policies. Indeed, it will be noted that after the decedent became disabled, the wife acting as his guardian borrowed on the policies (R. 94-96) and this was certainly the exercise of an incident of ownership within the meaning of the law.

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<sup>2</sup>The 1942 amendments to subdivision (g) did not change the law in any way which would preclude taxation in the instant case. True, Section 811(g)(2) as so amended, does provide that for the purposes of clause (B), the term "incident of ownership" does not include a reversionary interest, but that presupposes that the decedent did not pay the premiums and here he did. Where, as here, the premiums are paid by the decedent, even though out of community property, a reversionary interest is still an incident of ownership for purposes of applying the premium payment test to payments made on or before January 10, 1941. See Treasury Regulations 105, Section 81.27 (Appendix, *infra*); Paul, Federal Estate and Gift Taxation, 1946 Supplement, Section 10.37, p. 371.

Cases such as *Thomson v. Thomson*, 156 F. (2d) 581 (C.A. 8th), certiorari denied, 329 U.S. 793; *Dixon Lumber Co. v. Peacock*, 217 Cal. 415; *Shoudy v. Shoudy*, 55 Cal. App. 344, cited by taxpayer (Br. 18), are not tax cases; they turn on their peculiar facts and we do not read any of them as being at variance with our position here.

Nor can taxpayer derive any comfort from cases (*Morse v. Commissioner*, 100 F. (2d) 593 (C.A. 7th); *Commissioner v. Sharp*, 91 F. (2d) 804 (C.A. 3d); *Helvering v. Parker*, 84 F. (2d) 838 (C.A. 8th); *Pennsylvania Co., etc. v. Commissioner*, 79 F. (2d) 295 (C.A. 3d) cited on pages 18-19 of her brief. Those cases all presuppose that no incident of ownership was retained and they are distinguishable from the instant one where the insured retained incidents of ownership and the District Court so found. Moreover, those cases were all decided before *Helvering v. Hallock*, *supra*, which changed the law as to the effect of retaining a reversionary interest; and to the extent that they are opposed to *Hallock* they should of course no longer be followed. See, for example, *Schultz v. United States*, 140 F. (2d) 945, 949 (C.A. 8th), where *Helvering v. Parker* was expressly overruled as a result of *Helvering v. Hallock*; see also *Hock v. Commissioner*, *supra*, 152 F. (2d) 574 at 576; *Chase Nat. Bank v. United States*, *supra*, 116 F. (2d) 625 at 627.

In the light of the foregoing considerations, we submit that the District Court made no error in any

of its findings, conclusions or rulings in the instant case. They are in all respects correct and the judgment should be upheld by this Court.

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**CONCLUSION.**

The judgment of the District Court should be affirmed.

Dated, October 24, 1949.

Respectfully submitted,

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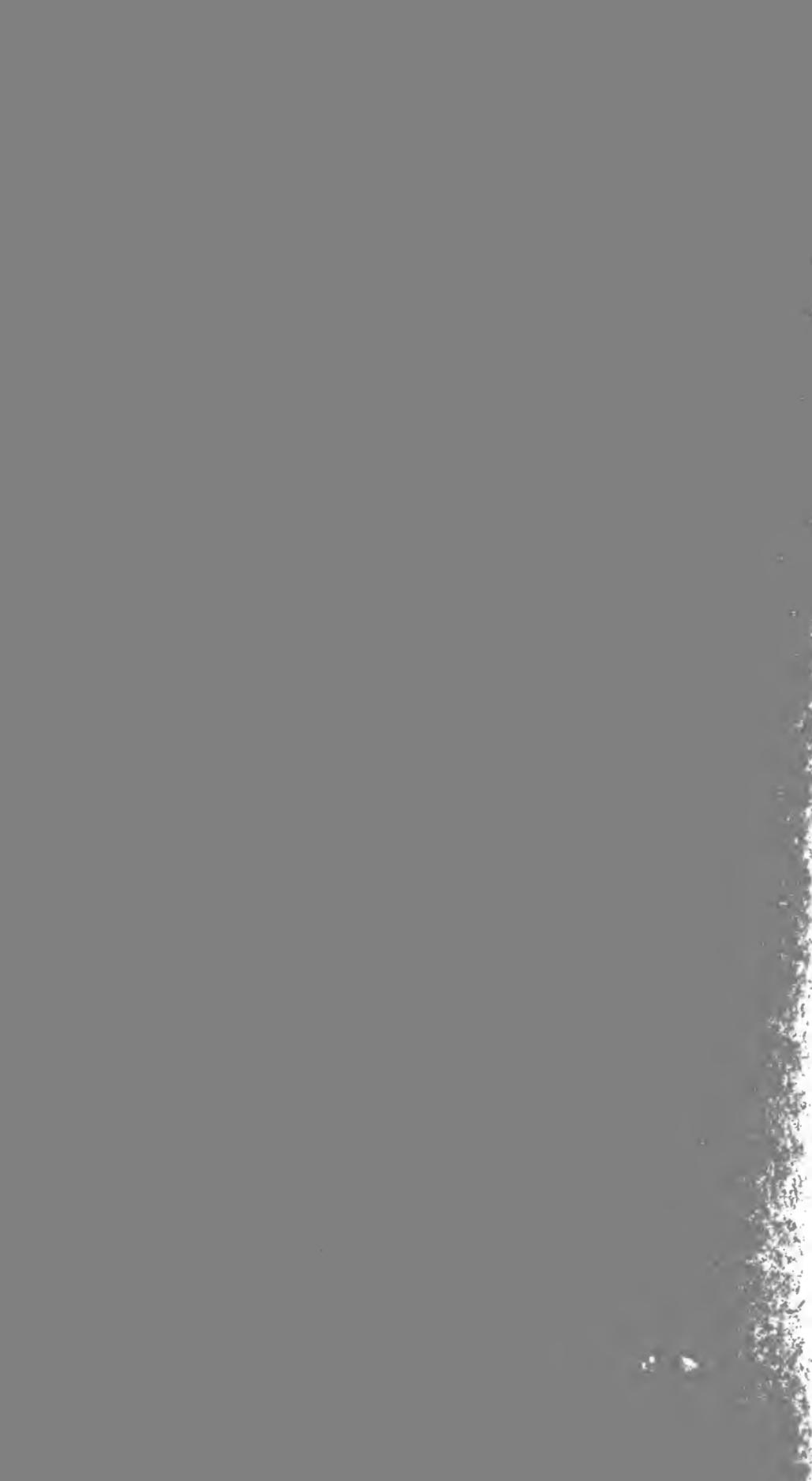
Assistant United States Attorney,

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**(Appendix Follows.)**



**Appendix.**



## Appendix

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Internal Revenue Code:

### Sec. 88. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \* \* \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

(d) *Revocable Transfers.*—

\* \* \* \* \*

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent

dent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

\* \* \* \* \*

(5) [as added by Section 402(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Transfers of Community Property in Contemplation of Death, Etc.*—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

(e) [as amended by Section 402(b) of the Revenue Act of 1942, *supra.*] *Joint and Community Interests.*—

\* \* \* \* \*

(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States,

or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

\* \* \* \* \*

(g) [as amended by Section 404(a) of the Revenue Act of 1942, *supra.*] *Proceeds of Life Insurance.*—

(1) *Receivable by the Executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) *Receivable by Other Beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same

ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

(3) *Transfer Not a Gift.*—The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2)(A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

(4) *Community Property.*—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term "incidents of ownership" includes incidents of ownership possessed by the decedent at his death as manager of the community.

(h) *Prior Interests*.—Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

\* \* \* \* \*

(26 U.S.C. 1946 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

Sec. 404. PROCEEDS OF LIFE INSURANCE.

\* \* \* \* \*

(c) *Decedents to Which Amendments Applicable*.

—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act [October 21, 1942]; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.15 [as amended by T.D. 5239, 1943, Cum. Bull. 1081, 1084, and further amended by T.D. 5699, 1949-12 Int. Rev. Bull. 5, 11.] *Transfers during life*.—

\* \* \*

In the case of estates of decedents dying after October 21, 1942, and on or before December 31, 1947, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811(d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811(c) or section 811(d), if the other conditions of taxability under such sections exist. If in the case of a decedent who died after October 21, 1942, and on or before December 31, 1947, property held as community property by such decedent and his spouse is transferred to themselves as joint tenants or as tenants by the entirety, the transfer is taxable under section 811(c), except with respect

to such part of the property so transferred as is attributable to the spouse under the exception stated in the first sentence of this paragraph. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23. (With respect to estates of decedents dying after December 31, 1947, and on or before April 2, 1948, involving transfers of community property, see section 81.23.)

Sec. 81.17 [as amended by T.D. 5512, 1946-1 Cum. Bull. 264, and further amended by T.D. 5741, 1949-20 Int. Rev. Bull. 10.] *Transfers Intended to Take Effect at or After the Decedent's Death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

A right to the possession or enjoyment of, or a right to the income from, the property, or the right

to designate the persons who shall possess or enjoy the property or the income therefrom, constitutes a right or interest in the property. (See also sections 81.18 and 81.19.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the next to the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

\* \* \* \* \*

In the case of a decedent who died on or before January 17, 1949, the date of the decision of the United States Supreme Court in *Commissioner v. Estate of Francois L. Church*, 335 U.S. 632, property transferred by the decedent shall not be included in his gross estate under this section if the decedent's only right or interest in the property consisted of an estate for life. (See, however, sections 81.18 and 81.19.)

Sec. 81.23 [as amended by T.D. 5239, *supra*, pp. 1085-1086, and further amended by T.D. 5699, *supra*.] *Community Property*.—In the case of estates of decedents dying after October 21, 1942, and on or

before December 31, 1947, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. Section 811(e)(2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

With respect to estates of decedents dying after October 21, 1942, and on or before December 31, 1947, see the provisions of section 81.15, section 81.22, and section 81.17(b), relating, respectively, to the inclusion of transfers of community property during life, the treatment of joint tenancies and tenancies by the entirety created by the transfer of community property, and the treatment of insurance upon the decedent's life held as, or acquired with, community property.

In the case of a decedent who died after December 31, 1947, and on or before April 2, 1948, the provisions contained in the first two paragraphs of this section and those provisions of sections 81.15, 81.22 and 81.27(b) referred to in the preceding paragraph may have a limited effect. Although such provisions are not applicable for the purpose of determining the value of the decedent's gross estate, the estate tax payable is, nevertheless, not to exceed the estate tax which would be imposed if such provisions were applicable.

Sec. 81.25 [as amended by T.D. 5239, *supra*, p. 1092.] *Life Insurance*.—Section 811(g) provides for the inclusion in the gross estate of insurance on the decedent's life (a) receivable by or for the benefit of the estate (for which see section 81.26), and (b) receivable by other beneficiaries (for which see section 81.27).

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system.

Life insurance not includible in the gross estate under the provisions of subsection (g) of section 811 and section 81.26, 81.27, or this section may, depending upon the facts of the particular case, be includible under some other subsection of section 811 and the sections of these regulations pertaining thereto. Thus in the case of insurance upon his own life which the decedent fully paid up prior to January 10, 1941, the date of Treasury Decision 5032 [C.B. 1941-1, 427], and which he gratuitously transferred prior to such date in contemplation of death, the insurance proceeds are includible in his gross estate under section 811(c). \* \* \*

Sec. 81.27 [as amended by T.D. 5239, *supra*, and further amended by T.D. 5699, *supra*, p. 13.] *Insurance Receivable by Other Beneficiaries.*—(a) *In case of decedent dying after December 31, 1947.*—The regulations prescribed under this paragraph (except as otherwise indicated in this section) are applicable only in the case of decedents who died after December 31, 1947. In such cases the amount of the aggregate proceeds of all insurance on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate as follows:

(1) Such insurance (not includible under (2) of this paragraph) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

(2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

The purchase of insurance upon the life of the decedent is attributed to the decedent even though the premiums, or other consideration, are paid only indirectly by the decedent. As thus used, the phrase "paid indirectly by the decedent" is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premiums or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. A payment is also made by the decedent if the decedent's employer makes the payment as compensation for services.

For the purposes of this paragraph, where premiums or other consideration are paid with property held as community property by the decedent and his spouse, the decedent shall (in the absence of additional circumstances showing payment indirectly by the decedent) be deemed to have paid only one-half of such premiums or other consideration. The general rule stated in the preceding sentence is not applicable unless the decedent and his spouse had equal and

existing interests in the community property used in the payment of the premiums or other consideration. An example of additional circumstances showing payment indirectly by the decedent which will render inapplicable the general rule is a transfer of property by the decedent to the community for the purpose of purchasing the insurance.

The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall be includible under (1) of this paragraph if the transfer constituted a gift to any extent under Chapter 4 of the Internal Revenue Code, or in case the transfer was made at a time when such chapter was not in effect, would have constituted a gift to any extent under such chapter had it been in effect at such time. The determination of whether a transfer constitutes (or would have constituted) a gift to any extent under Chapter 4 is to be made with respect to the concept of gifts under Chapter 4 and not with respect to the taxability of a particular transfer as a gift under Chapter 4 by reason of the amount of any exclusion or specific exemption allowed under such chapter. Thus, if the decedent transferred a policy to his creditors in consideration of the discharge of his obligations, and there was no element of donative intent in the transfer, no part of the proceeds would be includible in the gross estate. If the transfer conforms to any extent to the concept of a gift under Chapter 4, the formula stated in the next paragraph for determining the portion of the proceeds includible in the gross estate is applicable.

For the purpose of determining the portion of the insurance purchased by the decedent where the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent before such transfer as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For example, assume the decedent purchased for a single premium of \$600 an insurance policy paying \$1,200 upon his death. If at a time when the replacement cost of the same or a similar policy is \$900, the decedent gives such policy to his wife for a partial consideration of \$600, the \$600 premium originally paid by the decedent would be reduced by an amount which bears the same ratio to \$600 (the amount paid by the decedent) as \$600 (the consideration paid by the wife) bears to \$900, or by \$400. Therefore, the decedent will be considered to have paid \$200 in premiums and  $200/600$  of the \$1,200 proceeds, or \$400, will be included in his gross estate.

For the purposes of (1) of this paragraph, in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the

policy. For the purpose of the preceding sentence a reversionary interest is an incident of ownership.

For the purposes of this section, the term "incidents of ownership" is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For examples of "incidents of ownership" see paragraph (c) of this section. Section 811 (g)(2), as added by the Revenue Act of 1942, expressly provides that for the purposes of section 811(g)(2)(B) (see (2) of this paragraph), but not for the purposes of section 811(g)(2)(A) (see (1) of this paragraph), the term "incidents of ownership" does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership therein under which he reserves a reversionary interest may result in the proceeds of the policy being includible in his gross estate under section 811(c). See section 81.25.

In determining whether the decedent possessed an incident of ownership in a policy or in any part of a policy, regard must be given to the effect of the State or other applicable law upon the terms of the policy. As an example, assume that the decedent purchased a policy of insurance on his life with funds held by him and his surviving wife as community property, designating their son as beneficiary but retaining the right to surrender the policy. Under the local law,

the proceeds upon surrender would have inured to the marital community, and the wife's transfer of her one-half interest in the policy was not considered absolute prior to the decedent's death. Upon the wife's prior death, one-half of the value of the policy would have been included in her gross estate. Under these circumstances, the power of surrender possessed by the decedent as agent for his wife with respect to one-half of the policy is not, for the purposes of this paragraph, considered an "incident of ownership", and the decedent is, therefore, deemed to possess an incident of ownership in only one-half of the policy.

With respect to estates of decedents dying after December 31, 1947, and on or before April 2, 1948, involving insurance held as community property by the decedent and spouse, or acquired with property so held, see section 81.23.

(b) *In case of decedent dying after October 21, 1942, and on or before December 31, 1947.*—The regulations prescribed under this paragraph (except as otherwise indicated in this section) are applicable only in the case of decedents who died after October 21, 1942, and on or before December 31, 1947. In such cases, the regulations prescribed under paragraph (a) with respect to estates of decedents dying after December 31, 1947, are also applicable (except to the extent inconsistent with this paragraph). For the purposes of this paragraph, premiums or other consideration paid with property held as community property by the insured and spouse under the law of any State, Territory, or possession of the United

States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the decedent's spouse or derived originally from such compensation or from separate property of such spouse. With respect to the meaning of property derived originally from such compensation or from separate property of the decedent's spouse, see section 81.23. Section 811(g)(4) provides that the term "incidents of ownership" includes incidents of ownership possessed by the decedent as manager of the community where the insurance policy is property held as community property by the decedent and spouse.

\* \* \* \* \*



No. 12,277

IN THE

United States Court of Appeals  
For the Ninth Circuit

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LOUISE K. GODFREY,

*Appellant,*

VS.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue at San  
Francisco, California,

*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

---

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FILED

NOV 8 1949

PAUL P. O'BRIEN,  
CLERK



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LOUISE K. GODFREY,

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JAMES G. SMYTH, United States Col-  
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*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California, Southern Division.**

**APPELLANT'S REPLY BRIEF.**

---

**FOREWORD.**

The arguments in the brief for appellee are presented under the heading (BA 13-25) "The insurance proceeds in question were properly included in the gross estate under section 811 of the Internal Revenue Code". Appellant adopts the negative of this heading in replying to the arguments.

1. **THE INSURANCE PROCEEDS IN QUESTION WERE IMPROPERLY INCLUDED IN THE GROSS ESTATE UNDER SECTION 811 OF THE INTERNAL REVENUE CODE.**

Section 811 of the Internal Revenue Code contains a number of subdivisions, paragraphs, and clauses. Appellee contends that the insurance proceeds were properly includible under section 811 (c) as supplemented by section 811 (d) (5) (BA 18), or under section 811 (d) (2) as supplemented by section 811 (d) (5) (BA 19), or under section 811 (g) (BA 14-18).

A demonstration of the unsoundness of appellee's contentions respecting section 811 (g) will also dispose of his contentions respecting section 811 (c) and (d).

Section 811 (g) (1) has reference to the proceeds of life insurance receivable by an executor. (BA, Appx. iii.) That is not our case. Section 811 (g) (2) has reference to the proceeds of life insurance receivable by other beneficiaries. (BA, Appx. iii.) That is our case. Clause (A) of section 811 (g) (2) has reference to policies of life insurance "purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance". (BA, Appx. iii.) But under section 811 (g) (3) "the amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part". (BA, Appx. iv.) Section 811 (g) (2) (A) is therefore inapplicable to this case,

for a "money's worth" transfer and not a gift is here involved. (*In Re Sullivan's Estate*, 9 Cir. 1949, 175 F. 2d 657, 659-660.) Clause (B) of section 811 (g) (2) has reference to policies of life insurance "with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person". (BA, Appx. iii.) And section 811 (g) (2) further provides that "for the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest". (BA, Appx. iv.)

If section 811 (g) is to be applied at all in this case, it is therefore obvious that the proceeds of the insurance in question were improperly included in the gross estate if the insured did not possess at the time of his death an incident of ownership in the policies upon his life, as required by paragraph (2) (B).

Appellant pointed out at pages 16 to 18 of her opening brief that the creation of each life insurance trust was attended by a precedent "money's worth" oral agreement and understanding between the spouses that the insured would maintain the insurance intact for the full amount and that the wife and children should always be and remain the beneficiaries thereunder. The testimony of the wife respecting the oral agreement and understanding was uncontradicted and unimpeached. (R. 128-130.) It was corroborated. (R. 121-127.) It was testimony the District Court was bound to accept as true (*Grace Bros. v. Com. Int. Rev.*, 9 Cir. 1949, 173 F. 2d 170, 174), and did accept as true (Findings Nos. III and VIII, R. 19-20, 22-23).

That an oral agreement and understanding of such character between spouses is binding and enforceable under California law, cannot be doubted. (*United States v. Pierotti*, 9 Cir. 1946, 154 F. 2d 758; *Rogan v. Kammerdiner*, 9 Cir. 1944, 140 F. 2d 569, 570; *Greenwood v. Com. Int. Rev.*, 9 Cir. 1943, 134 F. 2d 914, 919-920; *Estate of Watkins*, 16 Cal. 2d 793, 797, 108 P. 2d 417; *Estate of Raphael*, 91 A.C.A. 1079, 1085-1086, 206 P. 2d 391.) Nor can it be doubted that California law controls on the legal consequence flowing from such oral agreement and understanding. (*In Re Sullivan's Estate*, 9 Cir. 1949, 175 F. 2d 657, 658-659.) That legal consequence under California law was the *immediate* vesting in the wife and children of the sole and unconditional ownership of the insurance and the *immediate* deprivation of any right on the part of the insured to change the beneficiary or assign the policy or borrow on the policy or surrender the policy or cancel the policy. (*Morrison v. Mutual Life Ins. Co.*, 15 Cal. 2d 579, 586-587; *Chilwell v. Chilwell*, 40 Cal. App. 2d 550; *Freitas v. Freitas*, 31 Cal. App. 19, 20.)

Although the District Court correctly found the facts respecting oral agreement and understanding between the spouses, its findings respecting the legal consequence flowing from the facts (R. 19-20, 22-23) were clearly erroneous and therefore to be disregarded on this appeal (*Grace Bros. v. Com. Int. Rev.*, 9 Cir. 1949, 173 F. 2d 170, 174).

A misconception appearing throughout appellee's brief needs correcting. Appellee supposes that appel-

lant is conceding that some interest or ownership of the insured in the insurance survived the oral agreement and understanding between the spouses. Appellee is mistaken. Appellant has not made nor does she make any such concession. In her opening brief she discussed the interests and ownerships of the spouses in the insurance before change by oral agreement and understanding. But she left no doubt as to her position after such change. It was thus summed up at page 18 of her opening brief, and is repeated: "From the foregoing considerations it logically follows that the insured had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children, and that therefore the proceeds of the life insurance policies were not includible in his gross estate for federal estate tax purposes."

The soundness of that position has been additionally demonstrated herein. Includibility of the insurance proceeds in the gross estate of the insured cannot be justified by resort to section 811 (g) of the Internal Revenue Code.

But appellee also resorts to section 811 (c) as supplemented by section 811 (d) (5). (BA 18-19.) The cited parts of the section have reference to transfers intended to take effect in possession or enjoyment at or after the grantor's death or in contemplation of his death. They are inapplicable here, for the very obvious reason that the transfer took effect *immediately*.

And again, appellee resorts to section 811 (d) (2) as supplemented by section 811 (d) (5). (BA 19.) The

cited parts of the section have reference to revocable transfers or irrevocable transfers not made for "money's worth". They, too, are inapplicable here, for the very obvious reason that an irrevocable transfer for "money's worth" is involved.

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**CONCLUSION.**

For the reasons appearing in the opening brief and herein supplemented, appellant again respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco,  
November 7, 1949.

I. M. PECKHAM,  
*Attorney for Appellant.*

No. 12278

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United States  
Court of Appeals  
For the Ninth Circuit.

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LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED,

Appellee.

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Transcript of Record

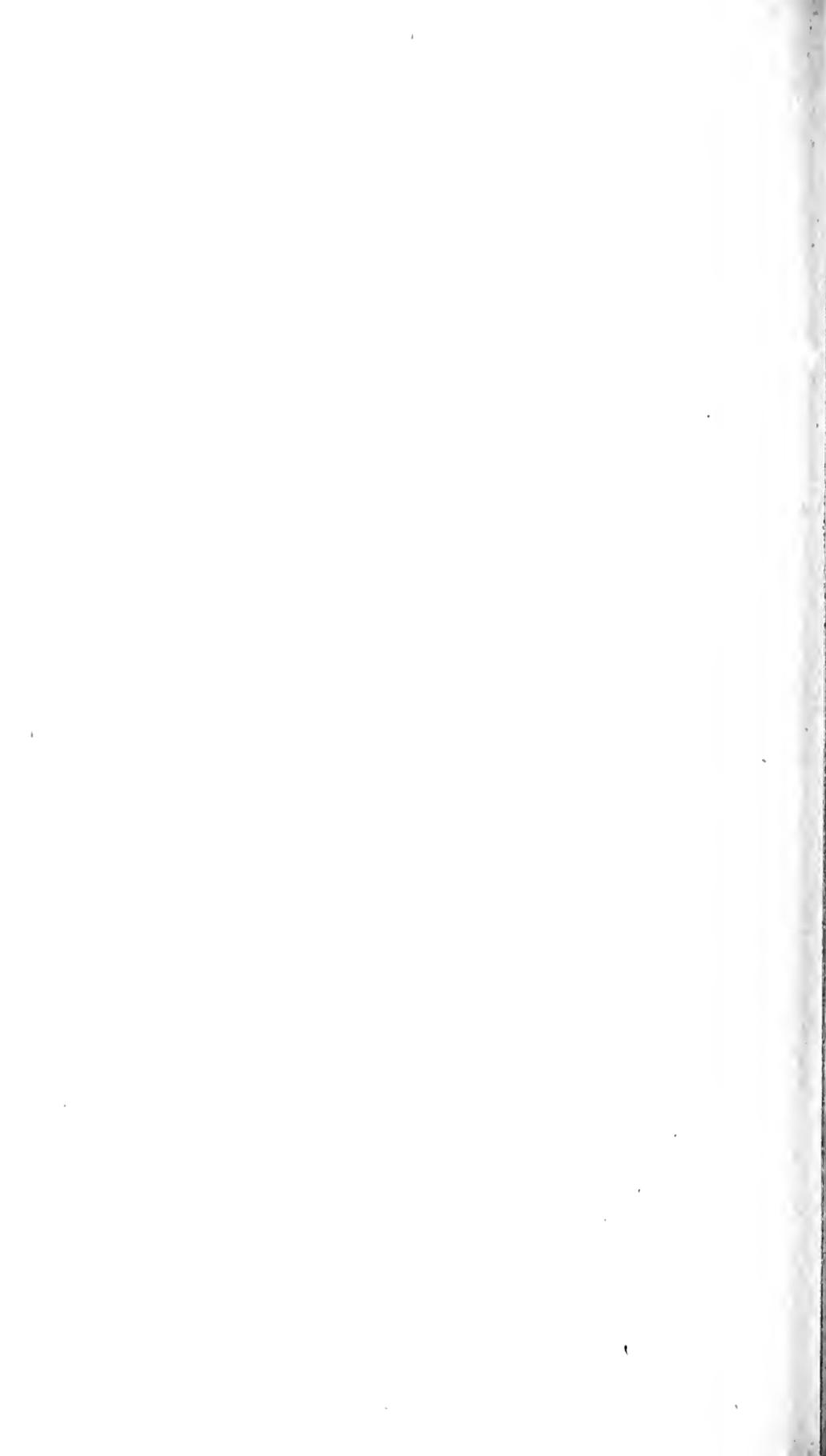
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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

OCT 28 1949

PAUL P. O'BRIEN,  
CLERK



No. 12278

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United States  
Court of Appeals  
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LESTER W. HURLEY,

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Appeal from the United States District Court for the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States for the  
Southern District of California, Central Division

Civil Action No. 5187-WM

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a corporation,

Defendant.

### COMPLAINT FOR ACCOUNTING

Now comes the above named plaintiff, and for his cause of action against the defendant alleges and states:

1. The plaintiff herein is a resident of the County of Jackson, State of Missouri.

2. That the defendant, Southern California Edison Company, Limited, is a corporation organized under and in pursuance of the laws of the State of California, with its principal office and place of business located in Los Angeles, California.

3. Plaintiff further states that the grounds upon which the jurisdiction of the court depends are:

Diversity of citizenship between the parties hereto, and the amount in controversy herein exceeds Three Thousand Dollars (\$3,000.00), and as grounds for jurisdiction in equity plaintiff avers that he seeks to secure an accounting from the defendant corporation for dividends due, owing and unpaid to plaintiff [2] herein on stock owned by

the plaintiff in defendant corporation, as well as stock rights to which he is entitled, and for which the defendant has failed and refused to account, although requested so to do.

4. Plaintiff further states that William Price, the former husband of Elizabeth J. Price, was, during his lifetime, the owner of a substantial amount of stock in the Southern California Edison Company, Limited; that on November 20th, 1928, under the direction of William Price, Certificates numbered AO-59630, AO-59635 and A-8752 to A-8756, inclusive, were issued to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants with full right of survivorship; that said certificates totaled five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited, of the par value of Twenty-five Dollars (\$25.00) per share; that at the time said stock was issued William Price resided in California and the plaintiff resided in Kansas City, Missouri.

5. Plaintiff further states that on November 20th, 1928, there were issued by the Southern California Edison Company, Limited, Certificates numbered A-10216, AO-86998 and AO-87011 of preferred stock in the Southern California Edison Company, Limited, to Elizabeth J. Price, George E. Burton and Lester Hurley, as well as eighty-eight (88) shares of common stock represented by Certificates numbered AO-59759 and AO-59770.

6. Plaintiff further states that thereupon the

said Elizabeth J. Price, George E. Burton and Lester Hurley became the owners in joint tenancy with full rights of survivorship of all of said stock represented by the above designated certificates; that said certificates so issued were delivered to Elizabeth J. Price; that Elizabeth J. Price was the grandmother of the plaintiff herein.

7. Plaintiff further states that at no time were said [3] certificates in the possession or control of Lester Hurley; that at no time prior to March 18, 1944, were said certificates presented to or examined by Lester Hurley, plaintiff herein.

8. Plaintiff further states that thereafter, and on January 5th, 1929, William Price died and was survived by his then wife, Elizabeth J. Price, and her son, George E. Burton.

9. Plaintiff further states that thereafter and promptly following the death of William Price, and for the purpose of cheating and defrauding the plaintiff out of his entire right, ownership and interest in and to the aforesaid 575 shares of common stock, and Certificates numbered A-8752 to A-8756, inclusive, and Certificates AO-59635 and AO-59630, representing said stock, the said Elizabeth J. Price and George E. Burton did, on the 19th day of February, 1929, present to defendant corporation the aforesaid seven certificates, purporting to bear on the back of said certificates an assignment and power of attorney authorizing the defendant company to transfer said certificates to Elizabeth J. Price and George E. Burton, as joint tenants with

full right of survivorship, thereby attempting to eliminate and destroy all the right, title, interest and ownership of plaintiff therein; that under date November 19, 1928, a dividend order was made up and thereafter filed with defendant company on December 11, 1928, which purported to bear the signature of Lester Hurley.

10. Plaintiff further states that at the time said dividend order and the assignments of the aforesaid stock certificates were delivered to defendant company, the plaintiff herein was a minor twenty years of age; that plaintiff did not discover the fraud that had been practiced upon him, as herein alleged, until March 18th, 1944; that promptly upon the discovery of said fraud, due notice of said fraud and deception that had been practiced upon him was given to the defendant company and suit was thereafter filed to enforce plaintiff's rights in and to [4] said stock.

11. Plaintiff further states that during the lifetime of Elizabeth J. Price, the plaintiff was never given any information as to the existence of the aforesaid shares of stock hereinabove described; that he had no knowledge or information as to the name or names in which the above described shares of stock stood; that plaintiff was led to believe by Elizabeth J. Price and George E. Burton, the son of Elizabeth J. Price, that upon the death of Elizabeth J. Price, the plaintiff might receive some benefit or interest in some stock, the exact nature and amount to depend upon her feeling toward plain-

tiff up to the time of her death; that plaintiff was led to believe and made to understand that any effort on the part of the plaintiff to inquire into her business and affairs or financial arrangements would result in unfavorable consideration of the plaintiff by Elizabeth J. Price in the disposition of the stock owned by her in defendant corporation; that plaintiff was led to believe, and did believe, that Elizabeth J. Price's imperious manner and intense resentment at the slightest inquiry by plaintiff as to her financial arrangements was merely a part of her personality.

12. Plaintiff further states that the representations so made to the plaintiff by Elizabeth J. Price and George E. Burton that whatever interest or benefit he might derive from stock in defendant company at any time owned by her or William Price would depend upon her feeling toward him at the time of her death were false, fraudulent and untrue, and known by Elizabeth J. Price and George E. Burton to be untrue when made; that said representations were made for the purpose of controlling the plaintiff and deceiving him as to his interest and ownership in the aforesaid shares of stock; that said representations were further made to prevent the plaintiff from asking any questions or making any inquiry that might bring to light or disclose plaintiff's ownership [5] and interest in and to the aforesaid stock, and the fraudulent transfer attempted on February 19th, 1929; that Elizabeth J. Price and George E. Burton well knew that

the ownership of all the above described stock was vested in the plaintiff on November 20th, 1928, in joint tenancy with Elizabeth J. Price and George E. Burton, and that his rights therein in no way depended upon the will, humor or caprice of Elizabeth J. Price; that said pretense that the ultimate interest would depend upon the will and favor of Elizabeth J. Price was maintained through the years in order that plaintiff might be made to feel that any act or inquiry by plaintiff that was displeasing to Elizabeth J. Price would result in the loss by plaintiff of any benefits which he might otherwise secure; that as a result of said deceit and misrepresentation plaintiff made no inquiry concerning said stock in defendant company until after the death of Elizabeth J. Price; that Elizabeth J. Price died on the 27th day of December, 1943.

13. Plaintiff further states that subsequent to the death of Elizabeth J. Price and in March, 1944, plaintiff learned for the first time that the above described stock was placed in his name on November 20th, 1928, and that the subsequent transfer, of the stock described in Paragraph 9 hereof, out of his name was secured through the forgery of his signature to said stock certificates; that as a result of said knowledge, suit was filed in the United States District Court for the District of Kansas, First Division, wherein George E. Burton was plaintiff, and Lester W. Hurley and Southern California Edison Company, Limited, a corporation, were defendants, Civil Action No. 4974.

14. Plaintiff further states that it was found by the court in said cause that none of said purported assignments and irrevocable powers of attorney attached to each of the certificates described in Paragraph 9 hereof bore the genuine and true signature of Lester W. Hurley, but that each of said signatures [6] of Lester W. Hurley appearing thereon was a forgery; that it was further found by the court that the dividend order dated November 19th, 1928, and filed with the Southern California Edison Company, Limited, on December 11th, 1928, does not bear the true and genuine signature of Lester W. Hurley, but that the purported signature of Lester W. Hurley appearing thereon was a forgery; that Lester W. Hurley had no knowledge that he owned or had any interest in the certificates designated in Paragraph 9 hereof, representing 575 shares of stock in the Southern California Edison Company, Limited, until March 18th, 1944.

15. Plaintiff further states that the court found that:

“In view of the circumstances as disclosed by the record, even had the defendant Hurley executed the instruments of transfer (which conclusion is not sustained by satisfactory evidence), the entire transaction was so tainted with deception practiced upon the defendant by his grandmother and his uncle, that the transfer of the 575 shares of stock cannot be approved by the court and thus become effective. Even had the defendant Hurley executed the instru-

ments of transfer while a minor, his notice of the corporation under date of March 20, 1944, shown in the record as defendant's Exhibit "L," which came to the attention of the plaintiff prior to the bringing of this action, constituted a complete disaffirmance of such transfer within a reasonable time after reaching his majority, upon the discovery that such transfer was claimed."

16. Plaintiff further states that it was further ordered, adjudged and decreed by the court that Lester W. Hurley was, upon the death of Elizabeth J. Price, the owner of an undivided one-half interest in and to the 575 shares of common stock in the Southern California Edison Company, Limited, [7] described in Paragraph 9 hereof.

17. Plaintiff further states that the findings of fact and conclusions of law filed in said cause on July 26th, 1945, is marked Exhibit "A," attached hereto, and the judgment filed in said cause on July 26th, 1945, is marked Exhibit "B," attached hereto, and each made a part hereof as fully and completely as if set out herein.

18. Plaintiff further states that from and after November 20th, 1928, as a result of his ownership in the above described stock, he became entitled, during the lifetime of Elizabeth J. Price, to one-third of all the dividends that were accumulated and paid on the 575 shares of stock described in Paragraph 4 hereof, together with his one-third interest in all stock rights that accrued to said stock; that as a result of the forgery hereinabove

described that occurred during the month of February, 1929, and the transfer of said stock on the books of the company into the names of Elizabeth J. Price and George E. Burton, the Southern California Edison Company, Limited, paid said dividends to Elizabeth J. Price without the consent, authorization or knowledge of the plaintiff herein; that in addition thereto the defendant company was, as a result of the forged dividend order dated November 19th, 1928, induced to and did pay all dividends and stock rights on stock described in Paragraph 5 hereof to Elizabeth J. Price without the knowledge, authorization or consent of the plaintiff herein; that one-third of said dividends and stock rights so illegally and unlawfully paid to Elizabeth J. Price were, in fact, due and owing to the plaintiff herein; that the one-third part of said dividends and stock rights so illegally and unlawfully paid and distributed to Elizabeth J. Price are in excess of the total sum of Ten Thousand Dollars (\$10,000.00); that plaintiff is entitled to seven per cent interest on each of said dividends, as well as the value of stock rights so issued, [8] as the same accrued from time to time until the same is paid to plaintiff herein. At all times in this paragraph mentioned, defendant knew or had reason to know of the fraud of Elizabeth J. Price and George E. Burton hereinbefore alleged.

19. Immediately after the filing, as hereinbefore alleged, of the judgment, a copy of which is attached hereto marked Exhibit "B," plaintiff de-

manded of defendant herein that it account to plaintiff for and pay and deliver to plaintiff all dividends and stock rights declared by defendant and owing to plaintiff but neither paid nor delivered to plaintiff as hereinbefore alleged. Repeatedly thereafter up to and again on February 8, 1946, defendant requested of plaintiff that he allow defendant time within which to investigate said matter and advised plaintiff that as soon as defendant had completed its study of his claim said defendant would further advise plaintiff, but said defendant has failed to either account, or pay, or deliver to plaintiff said dividends or stock rights.

Wherefore, plaintiff prays that the defendant herein be required, ordered and directed to account to the plaintiff herein for all dividends and stock rights paid and distributed to Elizabeth J. Price on all the stock hereinabove described; that the amount due plaintiff on dividends and stock rights so declared and distributed be found and determined by the court; that judgment be entered in favor of the plaintiff therefor, together with interest thereon at the rate of seven per cent per annum from the date of the respective payments so made by said company to date, together with such further and other relief as to the court shall seem just and proper, as well as for his costs and charges herein expended.

FRANK M. GUNTER &

THURMAN L. McCORMICK,

By /s/ FRANK M. GUNTER,

Attorneys for Plaintiff.

## EXHIBIT "A"

In the District Court of the United States  
for the District of Kansas

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Now on this day this cause having been heretofore taken under advisement and the Court now being fully advised, makes specific findings of fact and conclusions of law, as follows:

Findings of Fact

1. That upon the death of William Price on January 5, 1929, five hundred seventy-five (575) shares of stock in the Southern California Edison Company Ltd. represented by certificates dated November 20, 1928, and bearing Numbers AO59630, AO59635 and A8752 to A8756 inclusive, were owned by Elizabeth J. Price, George E. Burton and Lester Hurley as joint tenants with full rights of survivorship.

2. That Elizabeth J. Price died on the 27th day of December, 1943.

3. That upon February 19, 1929, there was is-

sued by the Southern California Edison Company Ltd. certificates bearing numbers AO61852 and A9230 to A9234 inclusive, for five hundred seventy-five (575) shares of common stock in the Southern California Edison Company Ltd. to Elizabeth J. Price and George E. Burton with full rights of survivorship, without the surrender of certificates dated November 20, 1928, bearing numbers AO-59630, AO59635 and A8752 to A8756 inclusive, properly endorsed.

4. That January 19, 1929, was Saturday and the Brotherhood State Bank of Kansas City, Kansas, closed at 12 o'clock [10] noon on said day.

5. That none of said purported "Assignments and Irrevocable Powers of Attorney" attached to each of the certificates designated in paragraph 1 hereof bear the true and genuine signature of Lester W. Hurley, but that each of said signatures of Lester W. Hurley appearing thereon is a forgery.

6. That no consideration of any character was ever paid by Elizabeth J. Price or George E. Burton to Lester W. Hurley, nor was any consideration of any character ever received by Lester W. Hurley from any other source for the transfer of the interest of Lester W. Hurley in the five hundred seventy-five (575) shares of stock described in paragraph 1 hereof.

7. That Lester W. Hurley had no knowledge that he owned or had any interest in the certificates designated in paragraph 1 hereof representing five hundred seventy-five (575) shares of stock in the

Southern California Edison Company Ltd. until March 18, 1944.

8. That at the time of the aforesaid attempted transfer of the above designated stock certificates Lester W. Hurley was a minor under the age of twenty-one (21) years.

9. That upon March 20, 1944, Lester W. Hurley disaffirmed the purported transfer of the above designated stock certificates, which disaffirmance was made within a reasonable time after reaching his majority.

10. That the dividend order dated November 19, 1928, and filed with the Southern California Edison Company, Limited, on December 11, 1928, does not bear the true and genuine signature of Lester Hurley, but that the purported signature of Lester Hurley appearing thereon is a forgery.

11. That the statements and conduct of Elizabeth J. Price and George E. Burton were calculated to and did conceal from the defendant herein the fact that he was the owner of an [11] interest in the above designated five hundred seventy-five (575) shares of stock represented by the aforesaid certificates as well as the fact that an attempt had been made on January 19, 1929, to transfer said stock to Elizabeth J. Price and George E. Burton as Joint tenants with full rights of survivorship.

12. That Lester W. Hurley had no knowledge that the dividend order dated November 19, 1928, existed until March 18, 1944.

Conclusions of Law

1. That defendant, Lester W. Hurley, is in no manner bound by the "Assignment and Irrevocable Power of Attorney" attached to each of the certificates of stock issued by the Southern California Edison Company, Limited, on November 20, 1928, being certificates numbered AO59630, AO59635 and A8752 to A8756, inclusive, as said assignments and each of them are void and of no force and effect.

2. That the defendant, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in the aforesaid five hundred seventy-five (575) shares of common stock of the Southern California Edison Company, Limited, or to two hundred eighty-seven and one half shares of said stock.

3. That the issue of stock certificates dated February 19, 1929, bearing numbers AO61852 and A9230 to A9234 inclusive, were fraudulently procured and are therefore void.

4. That Lester W. Hurley is in no manner bound by the dividend order dated November 19, 1928, and that said dividend order, insofar as it purports to be an order on the part of Lester W. Hurley to pay said dividends to Elizabeth J. Price, is void and of no force or effect.

EDGAR S. VAUGHT,  
U. S. District Judge.

Approved:

THURMAN L. McCORMICK

910 Rialto Building

Kansas City, Missouri

RICE, MILLER & HYATT

Huron Building

Kansas City, Kansas

By THOMAS C. LYSAUGHT

Attorneys for Defendant

Service of copy of the within Findings of Fact and Conclusions of Law prepared by attorneys for defendant acknowledged this 21st day of June, 1945.

STANLEY, STANLEY,

SCHROEDER, WEEKS &

THOMAS,

By ARTHUR J. STANLEY, JR.,

Attorneys for Plaintiff.

Filed July 26, 1945.

/s/ HARRY M. WASHINGTON,

Clerk.

EXHIBIT "B"

In the District Court of the United States  
for the District of Kansas

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY,

Defendant.

JUDGMENT

Now on this day, this cause having heretofore been fully heard by the Court (a jury having been duly waived) and thereafter taken under advisement and the Court now being fully advised finds the issues herein and each of them in favor of the defendant, Lester W. Hurley and against the plaintiff, George E. Burton.

It Is Therefore Ordered, Adjudged and Decreed by the Court that defendant, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in and to five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited.

It Is Further Ordered, Adjudged and Decreed by the Court that certificates dated February 19, 1929, and bearing numbers AO61852 and A9230 to A9234 inclusive, for five hundred seventy-five (575) shares of common stock of the Southern California

Edison Company, Limited, be and the same are hereby cancelled and for naught held; that said plaintiff, George E. Burton, be and he is hereby ordered and directed to surrender and deliver the last above designated certificates to the Southern California Edison Company, Limited, within 20 days from the date of the filing of this decree, with instructions from George E. Burton to the Southern California Edison Company, Limited, to issue in the place and stead thereof new certificates [14] for two hundred eighty-seven and one-half (287½) shares of common stock in the Southern California Edison Company, Limited, to Lester W. Hurley.

It Is Further Ordered, Adjudged and Decreed by the Court that title to the remaining and unappropriated two hundred eighty-seven and one-half (287½) shares of common stock in the Southern California Edison Company, Limited, including therein the pledged stock, if any, shall vest in George E. Burton.

It Is Further Ordered, Adjudged and Decreed by the Court that the defendant, Lester W. Hurley, have and recover his costs and charges herein expended and have execution for the enforcement of the terms and provisions of this judgment.

Dated this 24th day of July, 1945.

Enter

EDGAR S. VAUGHT,

Judge Assigned.

Foregoing Journal entry approved as to form.

Parties hereto stipulate that this journal entry of judgment may be signed by the Court during his absence from the jurisdiction of the Judicial District in which this was was tried.

STANLEY, STANLEY,  
SCHROEDER, WEEKS  
& THOMAS,

By LEE E. WEEKS,  
Attorneys for Plaintiff.

THURMAN L. McCORMICK,  
RICE, MILLER & HYATT,

By THOMAS C. LYSAUGHT,  
Attorneys for Defendant.

Filed July 26, 1945.

HARRY M. WASHINGTON,  
Clerk.

[Endorsed]: Filed Mar. 6, 1946.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes Now the defendant above named and answers plaintiff's complaint herein as follows:

First Defense

1. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1. and 3. of the complaint.

2. Admits the allegations contained in Paragraph 2. of complaint.

3. Answering Paragraph 4. of the complaint, defendant admits the allegations thereof, except that this defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, that at the time said stock was issued William Price resided in California and the plaintiff resided in Kansas City, Missouri.

4. Admits the allegations in Paragraph 5, and alleges that the number of shares represented by each certificate for [16] preferred stock therein described was as follows:

Certificate A-10216 .....	100 shares
Certificate AO-86998 .....	11 shares
Certificate 87011 .....	80 shares

5. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6., 7., and 8. of the complaint.

6. Answering Paragraph 9., defendant admits that the certificates and dividend order therein described were presented to defendant; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph.

7. Answering Paragraph 10., defendant admits that plaintiff on or shortly after March 18, 1944, notified defendant as therein alleged; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph.

8. Defendant alleges that it is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraphs 11. and 12. of the complaint.

9. Answering Paragraph 13., defendant admits that the action therein described was filed, but alleges that said action was thereafter dismissed as to this defendant; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph.

10. Admits the allegations contained in Paragraph 14., except that defendant alleges that it is without knowledge or information sufficient to form a belief as to the allegation that plaintiff had no knowledge of his ownership or interest in said certificates until March 18, 1944.

11. Admits the allegations contained in Paragraphs 15., [17] 16. and 17. of the complaint.

12. Answering Paragraph 18., defendant admits that as a result of the transfer on its books of the said stock described in Paragraph 4. of the complaint, and as a result of the dividend order dated November 19, 1928, relative to the dividends and stock rights on the stock described in Paragraph 5. of the complaint, it paid and delivered the said dividends and stock rights to Elizabeth J. Price, and admits a one-third ( $\frac{1}{3}$ ) part of a value thereof amounts to the sum of approximately Ten Thousand Dollars (\$10,000.00); defendant denies that said dividends and stock rights, or either of them, were illegally and unlawfully, or illegally or unlawfully, paid and distributed to Elizabeth J. Price, and denies that plaintiff is entitled to interest at

seven percent (7%) or at any other rate; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph.

13. Admits the allegations contained in Paragraph 19., except that defendant denies that said dividends and stock rights, or either of them, were or are owing to plaintiff.

#### Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

#### Third Defense

That the alleged cause of action set forth in plaintiff's complaint is barred by the provisions of Section 339, Subdivision 1. of the Code of Civil Procedure of the State of California.

#### Fourth Defense

That the alleged cause of action set forth in plaintiff's complaint is barred by the provisions of Section 337, Subdivision 1. of the Code of Civil Procedure of the State of California. [18]

Wherefore, defendant prays that plaintiff take nothing by his complaint herein, and that defendant have judgment for its costs.

FULCHER & WYNN,  
CHARLES E. R. FULCHER,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 14, 1946.

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

I.

Statement as to the Facts.

1. The following facts are stipulated to:

On Novemebtr 20, 1928, there was issued by the defendant corporation stock certificates #A8752 to #A8756, inclusive, and #AO59635 and #AO59630, for the aggregate number of 575 shares of the common stock of said corporation, so that said stock then stood of record on the books of the defendant company in the names of Elizabeth J. Price, George E. Burton and plaintiff Lester W. Hurley, as joint tenants.

On November 26, 1928, there was issued by the defendant corporation stock certificates AO59759 and AO59779 for the aggregate number of 88 shares of common stock and AO10216 and AO86998 and AO87011 in the aggregate amount of 191 shares of 6% preferred stock [21] of said corporation, so that said stock then stood of record on the books of the company in the name of Elizabeth J. Price, George E. Burton and plaintiff Lester W. Hurley, as joint tenants.

Under date of November 19, 1928, there was forwarded to the corporation a dividend order on the defendant's usual form purporting to bear the signatures of said Elizabeth J. Price, George E. Burton and Lester W. Hurley, covering said 575 shares of common stock, and directing that all dividends

be remitted to Mrs. Elizabeth J. Price. Said order bore #12742. Defendant received said order December 11, 1928.

Under date of November 22, 1928, there was forwarded to the corporation a dividend order on the defendant's usual form purporting to bear the signatures of said Elizabeth J. Price, George E. Burton and Lester W. Hurley, covering said 88 shares of common stock and 191 shares of preferred stock hereinbefore referred to, and directing that all dividends be remitted to Mrs. Elizabeth J. Price. Said order bore #12743. Defendant received said order December 11, 1928.

On January 22, 1929, there was received by the defendant corporation at Los Angeles, having been forwarded to it by the Brotherhood State Bank of Kansas City, Kansas, each of the certificates in the aggregate number of 575 shares of common stock hereinbefore referred to, which certificates purported to be assigned to "Mrs. Elizabeth J. Price, or George E. Burton," by form of assignment purporting to bear the signatures of Elizabeth J. Price, George E. Burton and Lester W. Hurley.

The assignments were then returned by defendant to the Brotherhood State Bank with the written request that the signatures of the purported transferors be guaranteed. [22]

The certificates were then re-sent to the defendant by the Brotherhood State Bank and were received by the defendant at Los Angeles on February 1, 1929, with the signatures of Elizabeth J. Price

and George E. Burton guaranteed thereon by said bank.

On February 7, 1929, the defendant corporation returned said certificates to said Brotherhood State Bank together with the defendant's letter, dated February 7, 1929, requesting that the transferee designation be changed to joint tenancy form and the signature of Lester W. Hurley be guaranteed.

In response to this letter said Brotherhood State Bank altered the transferee designation and added a guarantee of the genuineness of the purported signature of Lester W. Hurley, and thereupon the defendant corporation transferred said 575 shares of common stock to said Elizabeth J. Price and George E. Burton, as joint tenants.

Thereafter to and including the entry of the judgment hereinafter mentioned none of said 575 shares of common stock appeared upon the records of the defendant corporation to stand in the name of said Lester W. Hurley.

2. Plaintiff contends, and defendant says it has no information, that each of the purported signatures of Lester W. Hurley, including the one spelled "Hurleey" was a forgery, and the assignments and dividend orders were invalid.

3. It is stipulated by the parties that subsequently, to wit: about March 18, 1929, defendant received at Los Angeles from Mrs. Elizabeth J. Price and George E. Burton a dividend order on the defendant's usual form, numbered 13157, and signed by said Mrs. Elizabeth J. Price and George E. Bur-

ton, directing that dividends on common stock standing in their name be paid to Mrs. Elizabeth J. Price.

4. It is stipulated that pursuant to said transfer following said assignments purporting to bear the signatures of Mrs. Elizabeth J. Price, George E. Burton and Lester W. Hurley, and said dividend orders, there was paid and delivered to said Elizabeth J. Price the dividends and stock rights hereinafter mentioned, which had been, on or about, or immediately prior to the respective dates of payment, declared and set aside by the defendant as payable to its shareholders.

(a) It is agreed that the dividends and stock rights so paid by the defendant herein to Elizabeth J. Price on the said 575 shares of stock under dividend order #13157 are in the total sum of \$15,-108.12; that said common stock rights issued on said 575 shares of stock and delivered to Elizabeth J. Price are in the total amount of 1725 rights; that the total sum of said dividends and stock rights is made up of the following respective amounts paid and delivered on the following respective dates:

Dividends paid to Mrs. Elizabeth J. Price—  
Dividend Order #13157 dated March 18, 1929

Dividends Paid 2/19/29 to 12/27/43

1929	(3 quarters)	\$ 862.50
1930		1,150.00
1931		1,150.00
1932		1,150.00
1933		1,150.00

1934	1,006.25
1935	862.50
1936	862.50
1937	934.37
1938	1,006.25
1939	1,006.25
1940	1,092.50
1941	1,006.25
1942	1,006.25
1943 to 12/27	862.50

## Common Stock Rights Issued

1929 — 575 Rights.

1930 — 575 Rights.

1931 — 575 Rights.

## Price Range of Rights.

Year	High	Low
1929	3.55	2.80
1930	4.50	2.80
1931	2.81¼	1.75

[24]

(b) It is further agreed that in addition to the dividends paid and stock rights delivered in pursuance of dividend order No. 13157, the following dividends were paid and the following stock rights delivered to Elizabeth J. Price, in the respective amounts and on the respective dates hereinafter set forth; that said dividend payments were made and said stock rights delivered upon the authority of, and in pursuance of dividend order No. 12743, dated November 22, 1928:

Dividends paid to Mrs. Elizabeth Jane Price—

Dividend Order #12743 dated 11/22/28

Dividends paid on above stock to 12/27/43

Common Stock

Year	Amount	Year	Amount
1929	\$176.00	1937	\$143.00
1930	176.00	1938	154.00
1931	176.00	1939	154.00
1932	176.00	1940	167.20
1933	176.00	1941	154.00
1934	154.00	1942	154.00
1935	132.00	1943	132.00
1936	132.00		<hr/>
			\$2,356.20

Rights Issued on Common Stock

1929 — 88 Rights

1930 — 88 Rights

1931 — 88 Rights

Dividends paid to Mrs. Elizabeth Jane Price—

Dividend Order #12743 dated 11/22/28

Preferred Series "B" 6% Stock

Year	Amount	Year	Amount
1929	\$286.50	1937	\$286.50
1930	286.50	1938	286.50
1931	286.50	1939	286.50
1932	286.50	1940	286.50
1933	286.50	1941	286.50
1934	286.50	1942	286.50
1935	286.50	1943	286.50
1936	286.50		<hr/>
			\$4,297.50

## Price Range of Rights

Year	High	Low
1929	3.55	2.80
1930	4.50	2.80
1931	2.81 $\frac{1}{4}$	1.75

[25]

(c) It is further stipulated and agreed that for the purpose of this action, the stock rights for the year 1929 involved herein were of the value of \$3.07 $\frac{1}{2}$  per right; that the stock rights issued for the year 1930 were of the value of \$3.70 per right; that the stock rights issued for the year 1931 were of the value of \$2.53 per right.

5. Plaintiff claims, and defendant states it has no information that William Price died January 5, 1929; that Elizabeth Price died December 27, 1943; that at the time of the claimed transfers to Elizabeth J. Price and the dividend orders claimed by plaintiff to be forgeries, plaintiff was a minor of the age of twenty years; that he learned of the ownership of said stock on March 18, 1944; thereupon on March 20, 1944, he repudiated said transfers and said dividend orders.

6. It is admitted that promptly thereafter said Burton filed suit in the District Court of the United States for the District of Kansas, naming the plaintiff herein and the defendant herein each as defendants in said action; that on June 5, 1944, said Court ordered that each said persons so named as defendants appear in said action; that thereupon defendant herein appeared specially and moved to vacate said order and to quash service upon it, which said

motion was opposed by the plaintiff herein, and said motion was on the 29th day of September, 1944, heard by said Court, and thereafter said Court did, over the opposition of the plaintiff herein, grant said motion. Thereafter said action was tried on issues joined therein by the plaintiff therein and the plaintiff in this action, and said Court rendered its judgment and filed its findings, copies of which are attached to the complaint herein; immediately thereafter on October 15, 1945, plaintiff herein made written demand on the defendant to pay one-third of all of the cash and stock rights dividends so declared on said stock, together with legal interest; whereupon [26] defendant asked for time to investigate, but no payment has been made to plaintiff.

## II.

### Statement as to Documents

The following is a list of all documents exhibited by the parties to each other, the genuineness of each of which is admitted, excepting only as to the purported signature of the plaintiff herein appearing on any of the same, and excepting as to their validity:

1. Certificates #A8752 to and including #A8756, and #AO59635 and #AO59630, aggregating 575 shares of the common stock of defendant corporation, issued in the name of Mrs. Elizabeth J. Price, George E. Burton and Lester W. Hurley, and purported assignments of same.
2. Dividend orders #12742, #12743 and #13157.

3. Letter of defendant addressed to the Brotherhood State Bank at Kansas City, Kansas, dated February 7, 1929.

4. Letter of the Brotherhood State Bank addressed to the Southern California Edison Company, dated February 15, 1929.

III.

Statement as to Probable Duration of Trial  
Counsel believe the trial can be concluded in less than three days.

Dated: June 11, 1946.

FRANK M. GUNTER &  
THURMAN L. McCORMICK,

By /s/ FRANK M. GUNTER,  
Attorneys for Plaintiff.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,  
Attorneys for Defendant.

[Endorsed]: Filed June 12, 1946.

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[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER OF DEFENDANT

Comes Now The Defendant above named, and with leave of Court first had and obtained, makes this supplemental answer to plaintiff's complaint to conform to the evidence introduced at the trial of this cause:

(1) That subsequent to the date of the commencement of the above entitled action, and on June 5, 1946, defendant made written demand upon plaintiff that said plaintiff proceed against Elizabeth J. Price and against George E. Burton, and that plaintiff pursue his remedy against them, and each of them, and that defendant did inform plaintiff that in the event he neglected to do so, defendant would deem itself exonerated to the extent to which it was thereby prejudiced.

(2) That despite said demand, said plaintiff refused and neglected to proceed as requested, and that defendant has thereby been prejudiced in the full amount of the plaintiff's claim herein.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Defendant.

Affidavit of service by mail attached. [28]

State of California

County of Los Angeles—ss.

O. V. Showers being by me first duly sworn, deposes and says: that he is the Secretary of the Southern California Edison Co., Ltd., defendant in the above entitled action; that he has read the foregoing Supplemental Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ Illegible

Subscribed and sworn to before me this 22nd day of November, 1946.

[Seal] /s/ JUANITA SNIDER,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires August 12, 1949. [29]

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[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT IN SUPPORT OF PRETRIAL ORDER.

“II.

The payment by defendant of the dividends accruing to one of the several joint owners of the stock discharged defendant's liability to all of said owners.

California Civil Code, Sec. 1475.

Cober vs. Connolly, 20 Cal 2nd, 741, at 744.

Delano vs. Jacoby, 96 Cal. 275, at 278.”

Dated this 23 day of Sept., 1949.

In the District Court of the United States, Southern  
District of California, Central Division

No. 5187-WM Civil

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AFTER NEW TRIAL

A new trial of the above-entitled cause having heretofore been ordered and said cause having come on regularly for trial in the above-named court on November 3, 1948 and plaintiff having then appeared by Messrs. Thurman L. McCormick and Frank M. Gunter, his attorneys and the defendant having then appeared by Messrs. Charles E. R. Fulcher and Carol G. Wynn, E. W. Cunningham of counsel, its attorneys, and the cause having proceeded to a trial of the issue designated by the court in its order granting new trial, to-wit: whether or not defendant knew or had reason to know of the fraud perpetrated upon plaintiff by plaintiff's co-tenant, Elizabeth J. Price; and evidence oral and documentary having been received and the cause having been argued and submitted for

decision, the [30] court now makes findings of fact and conclusions of law as follows:

### Findings of Fact

#### I.

At the time of the commencement of this action and at all times herein mentioned plaintiff was a citizen and resident of the State of Missouri.

At the time of the commencement of this action and at all times herein mentioned defendant was a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business located in Los Angeles, California.

The amount in controversy between plaintiff and defendant in this action, exclusive of interest and costs, exceeds \$3,000.

Jurisdiction of this court is invoked by reason of the amount in controversy and the diversity of citizenship existing between plaintiff and defendant.

#### II.

Some years prior to November 19, 1928, William Price and Elizabeth J. Price were married. At the time of this marriage Elizabeth J. Price had two adult children born of a previous marriage: a son named George E. Burton and a daughter, who was plaintiff's mother. Prior to November 19, 1928, plaintiff's mother had died, leaving plaintiff as the sole surviving issue of her body.

For many years prior to November 19, 1928, plaintiff had resided, and at all times hereinafter

mentioned continued to reside, in the State of Missouri; and William Price had resided, and at all times hereinafter mentioned until his death continued to reside, in the State of California with plaintiff's grandmother, Elizabeth J. Price.

For sometime prior to November 19, 1928, William Price had been the owner of a substantial number of the authorized [31] issued and outstanding shares of the Series "B" six per cent preferred and the common capital stock of Southern California Edison Company, Limited, a corporation, the defendant herein.

### III.

On November 20, 1928, at Los Angeles, California, William Price caused the defendant to issue in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, the plaintiff, as joint tenants with full rights of survivorship, certificates numbered AO-59630, AO-69633 and A-8752 to A-8756 inclusive, evidencing ownership of 575 shares of the common capital stock of the defendant corporation, of the par value of \$25.00 per share; and William Price then and there caused the certificates so issued to be delivered to plaintiff's grandmother, Elizabeth J. Price.

### IV.

On November 20, 1928, at Los Angeles, California, William Price likewise caused the defendant to issue in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, the plaintiff, as joint tenants with full rights of survivorship, certificates

numbered AO-86998, AO-87011 and A-10216 evidencing ownership of 191 shares of Series "B" six per cent preferred stock of the defendant corporation, together with certificates numbered AO-59759 and AO-59770 evidencing ownership of 88 shares of the common capital stock of the defendant corporation; and William Price then and there likewise caused the certificates so issued to be delivered to Elizabeth J. Price.

#### V.

Sometime prior to November 19, 1928, Elizabeth J. Price had requested plaintiff to sign two dividend orders in blank on [32] the usual form provided by defendant for such purpose, and plaintiff did gratuitously sign and deliver said dividend order blanks to Elizabeth J. Price in the State of Missouri, but plaintiff then had no knowledge or understanding of the purpose for which Elizabeth J. Price requested his signature or of the use which Elizabeth J. Price intended to make of the documents which the plaintiff then signed.

#### VI.

On December 11, 1928, Elizabeth J. Price delivered to defendant at Los Angeles, California, one of the dividend order forms mentioned above in Paragraph V, bearing the signatures of Elizabeth J. Price, George E. Burton and plaintiff, directing that all dividends on the 575 shares of common stock described above in Paragraph III be remitted to Elizabeth J. Price.

Said dividend order was numbered 12742, and was and is in the words and figures following:

“Form-Inv. 21-A Rev. 12742

Kindly Sign and Return at Once  
Southern California Edison Company  
Dividend Order

Date Nov. 19th 1928

Southern California Edison Company  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to Mrs. Elizabeth J. Price at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley on the books of your company.

Stock how held.....

Original Preferred..... Preferred Series A.....

Common (575 shares) Preferred Series B.....

Signature Mrs. Elizabeth J. Price

Address.....

Signature George E. Burton

Address 1046 Ann Ave. Kansas City,

Kansas

Signature Lester Hurley

Address.....

Witness:

Signature Helen Burton

Address 1046 Ann Ave. K. C. Kans.

Address for sending dividends: 1301 West 52nd St.  
Los Angeles.

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Dec 11 1928''

VII.

On December 11, 1928, Elizabeth J. Price delivered to defendant at Los Angeles, California, the second of the dividend order forms mentioned above in Paragraph V, bearing the signatures of Elizabeth J. Price, George E. Burton and plaintiff, directing that all dividends on the 191 shares of Series "B" six per cent preferred and the 88 shares of common stock described above in Paragraph IV be remitted to Elizabeth J. Price.

Said dividend order was numbered 12743, and was and is in the words and figures following: [34]

"Form-Inv. 21-A Rev. 12743

Kindly Sign and Return at Once  
Southern California Edison Company  
Dividend Order

Date Nov 22nd 1928

Southern California Edison Company,  
Los Angeles, California

Gentlemen:

Until this order is revoked in writing, please re-

mit to Mrs. Elizabeth J. Price at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley on the books of your company.

Stock how held.....

Original Preferred..... Preferred Series A.....

Common 88 shares Preferred Series B 191 shares

Signature Mrs. Elizabeth J. Price

Address 1301 West 52nd St. Los Angeles

Signature George E. Burton

Address 1046 Ann Ave. Kansas City,  
Kansas

Signature Lester Hurley

Address 5716 Scarritt K C Mo.

Witness:

Signature R. N. Jones

Address 3829 Garfield Ave.

KC Mo.

Address for sending dividends: 1301 West 52nd  
Street Los Angeles

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Dec 11 1928" [35]

### VIII.

William Price died at Los Angeles, California, on January 5, 1929, and Elizabeth J. Price accom-

panied his remains to the State of Missouri for burial.

### IX.

On or about January 19, 1929, at Kansas City, in the State of Kansas, Elizabeth J. Price caused the Brotherhood State Bank of that city to forward to defendant at Los Angeles, California, the certificates for 575 shares of common stock listed above in Paragraph III, together with forms of assignment attached purporting to bear the signatures of Elizabeth J. Price, George E. Burton and plaintiff, and purporting to assign the 575 shares of common stock to "Mrs. Elizabeth J. Price, or George E. Burton."

The certificates with the forms of assignment attached were received by defendant on January 22, 1929, and the assignments were thereupon returned to the Brotherhood State Bank with the request by defendant that the signatures of the purported transferers be guaranteed.

On February 1, 1929, defendant again received the forms of assignment with the signatures of Elizabeth J. Price and George E. Burton thereon guaranteed by Brotherhood State Bank. On February 7, 1929, defendant again returned the forms of assignment with a letter suggesting that the transferee designation be changed to joint tenancy form and again requesting that the purported signature of plaintiff be guaranteed. In response to this letter the Brotherhood State Bank altered the forms of assignment by changing the transferee

designation from "Mrs. Elizabeth J. Price, or George E. Burton" to Elizabeth J. Price and George E. Burton, as joint tenants, with full rights of survivorship;" and the bank thereupon added to each form [36] of assignment a guarantee of the genuineness of the purported signature of plaintiff.

This alteration of the transferee designation was made by the Brotherhood State Bank without any authority from plaintiff and without the knowledge or consent of plaintiff.

Thereafter and on or about February 19, 1929, defendant received the forms of assignment from the Brotherhood State Bank with the transferee designation altered and with the signatures of the purported transferors guaranteed as aforesaid, and defendant thereupon transferred the 575 shares of common stock to Elizabeth J. Price and George E. Burton as joint tenants.

Thereupon and at all times thereafter from on or about February 19, 1929, until following entry of the judgment of the United States District Court for the District of Kansas on July 26, 1945, hereinafter mentioned, none of the 575 shares of common stock appeared upon the records of defendant in the name of plaintiff.

## X.

Thereafter and on or about March 18, 1929, Elizabeth J. Price and George E. Burton delivered to defendant a dividend order, numbered 13157, on defendant's usual form, signed by Elizabeth J. Price and George E. Burton and directing that all

dividends on common stock standing in the names of Elizabeth J. Price and George E. Burton as joint tenants be paid to Elizabeth J. Price until such order be revoked.

## XI.

Thereafter from time to time defendant declared and set aside as payable to its shareholders certain dividend and stock rights.

The dividends so declared and set aside to the holder [37] or holders of the 575 shares of common stock described above in Paragraph III during the period from February 15, 1929 until December 27, 1943 were declared and set aside on the dates and in the amounts hereinafter set forth:

Item	Year	Amount of Dividend
1	1929 (last three quarters)	862.50
2	1930	1,150.00
3	1931	1,150.00
4	1932	1,150.00
5	1933	1,150.00
6	1934	1,006.25
7	1935	862.50
8	1936	862.50
9	1937	934.37
10	1938	1,006.25
11	1939	1,006.25
12	1940	1,092.50
13	1941	1,006.25
14	1942	1,006.25

15	1943 (to Dec. 27)	862.50
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16	The aggregate value of all dividends so declared and set aside was and is	\$15,108.12
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The stock rights so declared and set aside to the holder or holders of the 575 shares of common stock described above in Paragraph III during the period from February 15, 1929 until December 27, 1943 were as follows:

17	In 1929 a total of 575 common stock rights then having a value of \$3.075 per right, or a total value of.....\$ 1,768.13 were so declared and set aside [38]	
----	--	--

18	In 1930 a total of 575 common stock rights then having a value of \$3.70 per right, or a total value of.....\$ 2,127.50 were so declared and set aside	
----	--	--

19	In 1931 a total of 575 common stock rights then having a value of \$2.53 per right, or a total value of ..... 1,454.75 were so declared and set aside	
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20	The aggregate value of all stock rights so declared and set aside was and is .....	\$ 5,350.38
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21	The aggregate value of all dividends and all stock rights so declared and set aside was and is.....	\$20,458.50
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## XII.

The dividends and stock rights listed above in Paragraph XI in the total sum of \$20,458.50 were paid and delivered by defendant to Elizabeth J. Price under dividend order No. 13157 during the period from February 19, 1929 until the death of Elizabeth J. Price on December 27, 1943.

## XIII.

All the dividends and stock rights listed above in Paragraph XI were declared and set aside, and were paid and delivered by defendant to Elizabeth J. Price, without any notice to plaintiff and without any knowledge or authorization or consent on the part of plaintiff.

At all times mentioned above in Paragraph XI, plaintiff was the owner of an undivided one-third interest in the 575 shares of common stock described above in Paragraph III, and was entitled to receive one-third of all dividends and stock rights paid and delivered by defendant to Elizabeth J. Price, as stated above in Paragraph XII. [39]

## XIV.

At the time of the issuance of the certificates for 575 shares of common stock described above in Paragraph III, on November 20, 1928, plaintiff was a minor of the age of twenty years, and had no notice or knowledge of the issuance of any of the certificates. The certificates were never in the possession or under the control of plaintiff, and plaintiff did not know of his ownership of any interest

in any stock of the Southern California Edison Company, Limited, and did not know of the nature or purpose or effect or of the use made of the dividend order blanks signed by plaintiff at the request of Elizabeth J. Price, as stated above in Paragraph V, and did not know of the existence of any purported assignment of his interest in the 575 shares of common stock to Elizabeth J. Price and George E. Burton, and did not know of the declaration or payment of any dividends or of the issuance of any stock rights on the 575 shares of common stock, and had no knowledge of any of the facts set forth above in Paragraphs III, VI, IX, X, XI and XII, until March 18, 1944.

For many years prior to 1928 plaintiff had great trust and confidence in Elizabeth J. Price and George E. Burton, and such feeling of trust and confidence on the part of plaintiff continued until the death of his grandmother on December 27, 1943. Throughout this period both Elizabeth J. Price and George E. Burton were well aware of and freely accepted the great trust and confidence reposed in each of them by plaintiff, and a fiduciary relationship in fact existed in all the dealings throughout this period between Elizabeth J. Price and plaintiff and George E. Burton and plaintiff.

From time to time throughout the years from 1928 until the death of Elizabeth J. Price on December 27, 1943, Elizabeth J. Price and George E. Burton concealed from plaintiff [40] all the facts set forth above in Paragraphs III and IV, and

concealed from plaintiff all the facts with respect to his ownership of any interest in any stock of the defendant corporation, and during this period Elizabeth J. Price from time to time represented to plaintiff that he might receive from her estate upon her death certain stock; that whatever he might so receive would depend upon the will and favor of his grandmother; that she resented any inquiry or prying by plaintiff into her financial affairs or business arrangements.

Plaintiff believed these representations and in reliance upon them signed the blank dividend orders at the request of Elizabeth J. Price, as set forth above in Paragraph V, without inquiry as to the reason for his signature and without any knowledge or understanding as to the purpose or effect of his signature.

As a further result of plaintiff's reliance upon these representations, and of the concealment by Elizabeth J. Price and George E. Burton of plaintiff's interest in any stock of the defendant corporation, plaintiff made no inquiry concerning the stock of defendant or any other financial affairs or arrangements of either William Price or Elizabeth J. Price until after the death of his grandmother on December 27, 1943.

#### XV.

On March 20, 1944, promptly following his first discovery and knowledge on March 18, 1944, of any of the facts set forth above in Paragraphs III, VI, IX, X, XI or XII, plaintiff disaffirmed all the

aforementioned transfers and dividend orders purporting to have been executed by him.

Thereafter and on June 2, 1944, George E. Burton commenced an action in the United States District Court for the District of Kansas, entitled "George E. Burton, plaintiff v. Lester W. Hurley and [41] Southern California Edison Company, Limited, a corporation, defendants," and numbered 4974 on the records of that court. A copy of the complaint in said action is hereto attached, marked Exhibit "A" and incorporated by reference herein.

Thereafter the defendant herein appeared in said Kansas action and moved to quash the service of process upon it as a party defendant therein, upon the ground that Southern California Edison Company, Limited, a corporation, was not present in the District of Kansas and had not been served with process in the District of Kansas. Upon the hearing of this motion the United States District Court for the District of Kansas entered an order quashing the purported service of process upon the Southern California Edison Company, Limited, a corporation, as a party defendant in that action.

Thereafter and on or about July 11, 1944, plaintiff herein appeared as party defendant in said Kansas action and filed therein his answer and cross-petition, a copy of which is hereby attached, marked Exhibit "B" and incorporated by reference herein.

Thereafter George E. Burton as plaintiff in said Kansas action filed his answer to the cross-petition

of Lester W. Hurley as defendant therein, a copy of which answer to cross-petition is hereto attached, marked Exhibit "C" and incorporated by reference herein.

## XVI.

Thereafter the Kansas action proceeded to a trial of the issues joined by the pleadings on the part of the plaintiff therein, George E. Burton, and the plaintiff herein, Lester W. Hurley, copies of which are hereto attached and marked Exhibits "A", "B" and "C" as stated above.

Following trial of those issues, the United States District Court for the District of Kansas, made and filed written findings of fact and conclusions of law in said action, a copy [42] of which is hereto attached, marked Exhibit "D" and incorporated by reference herein.

Thereafter and on July 26, 1945, the United States District Court for the District of Kansas entered its judgment in said action in favor of the defendant therein and plaintiff herein, Lester W. Hurley, and against the plaintiff therein, George E. Burton. In and by said judgment it was ordered, adjudged and decreed by the court that the plaintiff herein, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in and to five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited, described above in Paragraph III. A copy of the judgment in the Kansas action is hereto attached,

marked Exhibit "E" and incorporated by reference herein.

Prior to the commencement of plaintiff's action in this court the above mentioned judgment of the Kansas court had become and was final.

#### XVII.

In the above mentioned Kansas action, the United States District Court for the District of Kansas found and adjudicated that none of the assignments described above in Paragraph IX, purporting to have been executed by plaintiff herein covering his interest in the 575 shares of common stock described above in Paragraph III, "bore the true and genuine signature of Lester W. Hurley, but that each of said signatures of Lester W. Hurley appearing thereon is a forgery."

#### XVIII.

On October 15, 1945, plaintiff made written demand on defendant herein to pay to plaintiff one-third of the amount of all cash dividends, and one-third of the value of all stock rights declared and set aside to the holder or holders of the 575 shares of common stock described above in Paragraph III, to wit, the [43] dividends and stock rights listed and described above in Paragraphs XI and XII, together with legal interest thereon.

In response to plaintiff's demand, defendant requested time to investigate, but no payment has been made to plaintiff.

## XIX.

During the period from the receipt by defendant of dividend order No. 12743 on December 11, 1928, as set forth above in Paragraph VII, until the death of Elizabeth J. Price, defendant from time to time declared and set aside as payable to its shareholders certain dividends and stock rights.

The dividends so declared and set aside during that period to the holder or holders of the 191 shares of Series "B" six per cent preferred stock described above in Paragraph IV were as follows:

Item	Year	Amount of Dividend
1	1929	\$ 286.50
2	1930	286.50
3	1931	286.50
4	1932	286.50
5	1933	286.50
6	1934	286.50
7	1935	286.50
8	1936	286.50
9	1937	286.50
10	1938	286.50
11	1939	286.50
12	1940	286.50
13	1941	286.50
14	1942	286.50
15	1943 (to Dec. 27)	286.50

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16 The aggregate value of all dividends so declared and set aside was and is.....\$4,297.50

The dividends so declared and set aside during that period to the holder or holders of the 88 shares of common stock described above in Paragraph IV were as follows:

Item	Year	Amount of Dividend
1	1929	\$ 176.00
2	1930	176.00
3	1931	176.00
4	1932	176.00
5	1933	176.00
6	1934	154.00
7	1935	132.00
8	1936	132.00
9	1937	143.00
10	1938	154.00
11	1939	154.00
12	1940	167.20
13	1941	154.00
14	1942	154.00
15	1943 (to Dec. 27)	132.00

---

16 The aggregate value of all dividends so declared and set aside was and is.....\$2,356.20

The stock rights so declared and set aside during that period to the holder or holders of the 88 shares of common stock described above in Paragraph IV were as follows:

17 In 1929 a total of 88 common stock rights then having a value of \$3.075 per right, or a total value of.....\$ 270.60

	were so declared and set aside	
18	In 1930 a total of 88 common stock rights then having a value of \$3.70 per right, or a total value of.....	325.60
	were so declared and set aside [45]	
19	In 1931 a total of 88 common stock rights then having a value of \$2.53 per right, or a total value of.....	222.54
	were so declared and set aside	
		<hr/>
20	The aggregate value of all stock rights so declared and set aside was and is..\$	818.84
21	The aggregate value of all dividends and all stock rights so declared and set aside was and is.....	\$3,175.04

XX.

The dividends and stock rights in the total sum of \$3,175.04, described above in Paragraph XIX, were paid to and delivered by defendant to Elizabeth J. Price under dividend order No. 12743 during the period from December 11, 1928, until the death of Elizabeth J. Price on December 27, 1943.

XXI.

At all times since November 20, 1928, plaintiff's name, together with his post office address, has appeared on the records of defendant as one of the owners of the 191 shares of Series "B" six per cent preferred and the 88 shares of common capital stock described above in Paragraph IV.

Defendant did not, on November 20, 1928, or at

any time thereafter until following plaintiff's disaffirmance on March 20, 1944, have actual notice or knowledge of the fact that plaintiff was a minor at the time he executed dividend orders No. 12742 and No. 12743. [46]

## XXII.

All the dividends and stock rights listed above in Paragraph XIX were declared and set aside, and were paid and delivered by defendant to Elizabeth J. Price without any notice at any time to plaintiff and without any knowledge or authorization or consent on the part of plaintiff.

At all times mentioned above in Paragraph XIX plaintiff was the owner of an undivided one-third interest in the 191 shares of Series "B" six per cent preferred stock and the 88 shares of common stock, and was entitled to receive one-third of all dividends and stock rights declared and set aside, and later paid and delivered by defendant to Elizabeth J. Price, as stated above in Paragraph XX.

## XXIII.

At the time of the issuance of the certificates for 191 shares of Series "B" six per cent preferred stock and 88 shares of common stock referred to above in Paragraph IV, on November 20, 1928, plaintiff was a minor of the age of twenty years, and had no notice or knowledge of the issuance of any of the certificates. The certificates were never in the possession or under the control of plaintiff, and plaintiff did not know of his ownership of any

interest in any stock of the Southern California Edison Company, Limited, and did not know of the nature or purpose or effect or of the use made of the dividend order blanks signed by plaintiff at the request of Elizabeth J. Price, as stated above in Paragraph V, and did not know of the declaration or payment of any dividends or of the issuance of any stock rights on the 191 shares of Series "B" six per cent preferred stock or the 88 shares of common stock, and had no knowledge of any of the facts set forth above in Paragraphs IV, VII, XIX and XX, until March 18, 1944. [47]

#### XXIV.

On March 20, 1944, promptly following his first discovery and knowledge on March 18, 1944, of any of the facts set forth above in Paragraphs IV, VII, XIX or XX, plaintiff disaffirmed all the aforementioned transfers and dividend orders purported to have been executed by him.

#### XXV.

On October 15, 1945, plaintiff made written demand on defendant to pay plaintiff one-third of all the cash dividends, together with one-third of the value of all stock rights, declared and set aside on the 191 shares of Series "B" six per cent preferred stock and the 88 shares of common stock, to wit, the dividends and stock rights listed and referred to in Paragraphs XIX and XX above; but the defendant has failed and refused to pay the same or any part thereof.

Prior to the commencement of this action, on March 6, 1946, plaintiff demanded of defendant that defendant account for and deliver to plaintiff all dividends and stock rights declared and set aside by defendant for the owners of the 121 shares of Series "B" six per cent preferred stock and 88 shares of common stock described above in Paragraph IV, but defendant has failed and refused to account for or pay or deliver any part thereof.

Thereafter and on June 5, 1946, defendant made written demand upon plaintiff that plaintiff proceed against the Estate of Elizabeth J. Price, deceased, and against George E. Burton and that plaintiff pursue his remedy against the Estate of Elizabeth J. Price, deceased, and George E. Burton, and each of them, and defendant then and there informed plaintiff that in the event plaintiff failed so to pursue his remedy, defendant would deem itself exonerated to the extent to which it was thereby prejudiced. [48] Plaintiff has refused to proceed as requested, but the court finds that defendant has not been prejudiced thereby.

## XXVI.

That plaintiff was a minor at the time he signed dividend orders No. 12742 and No. 12743, and plaintiff received no consideration for the execution of either of the dividend orders, and the nature of the documents and the purpose for which they were to be used was concealed from the plaintiff at the time he signed said dividend orders and there-

after. That plaintiff's disaffirmance of the dividend orders under the circumstances hereinabove set forth in these findings of fact was made within a reasonable time after reaching his majority.

#### XXVII.

That defendant had no actual knowledge of the fraud hereinbefore found to have been perpetrated upon Lester W. Hurley by his grandmother, either at the time said fraud was perpetrated or thereafter, and the court further finds that defendant had no reason to believe that any fraud was being, or had been, so perpetrated.

#### XXVIII.

That under the respective dates of January 25, 1929, December 27, 1929, and December 19, 1930, a resolution of the Board of Directors of the Southern California Edison Company, Ltd., was adopted referring to the common and original preferred stockholders of this corporation of record on the respective dates of March 29, 1929, 28th day of February 1930, and the 27th day of February 1931, authorized the issue to the stockholders of record the stock rights described in Paragraph XI, items 17, 18, 19, 20 and 21 and Paragraph XIX items 17, 18, 19, 20 and 21.

That said respective resolutions further provided that warrants representing each stockholder's right to subscribe for and purchase said additional shares be issued in the name of the stockholder and mailed or delivered on or before April 22, 1929, March

25, [49] 1930, March 25, 1931, together with a letter setting forth the terms and conditions on which the said right to subscribe may be exercised, as set out in said resolutions, to each stockholder having such right of record on said 29th day of March, 1929; 28th day of February 1930, and 27th day of February, 1931; that all of said warrants representing right to subscribe for and purchase full shares be issued in the name of the stockholder and be assignable by endorsement and delivery of said warrant.

### Conclusions of Law

#### I.

The title to the 575 shares of common stock described in Paragraph III of the findings of fact was litigated and fully and finally adjudicated in that certain action in the United States District Court for the District of Kansas, entitled "George E. Burton, plaintiff v. Lester W. Hurley, defendant" and numbered 4974; and the findings of the United States District Court for the District of Kansas that each of the signatures "Lester W. Hurley" appearing on the forms of assignment described above in Paragraph IX of the findings of fact is a forgery and that none of the purported assignments bear the true and genuine signature of the plaintiff herein is final and *res judicata* as between the plaintiff herein and George E. Burton; and both that finding and the judgment of the United States District Court for the District of Kansas decreeing plaintiff to be "the owner of an undivided one-half

(1/2) interest in and to five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited” are final and binding and res judicata as between plaintiff and defendant herein. [Perkins vs. Benguet Mining Co., 55 Cal. App. (2d) 720, 747-53. 132 P. (2d) 70 (1942); Commercial Nat. Bank v. Alleway, 207 Iowa 419, 223 N.W. 167 (1929).]

## II.

The finding of the United States District Court for the [50] District of Kansas, “That the dividend order dated November 19, 1928, and filed with the Southern California Edison Company, Limited, on December 11, 1928, does not bear the true and genuine signature of Lester Hurley, but that the purported signature of Lester Hurley appearing thereon is a forgery,” being dividend order No. 12742 set forth above in Paragraph VII of the findings of fact, must be considered a gratuitous finding of fact and therefore not res judicata, since the validity of dividend order No. 12742 was not placed in issue by the pleadings in that action and was not a matter necessary to be adjudicated in determining that action. [Garwood v. Garwood, 29 Cal. 514 (1866); Lang v. Lang 182 Cal. 765, 768, 190 Pac. 181 (1920); Hutchison v. Reclamation District, 81 Cal. App. 427, 437, 254 Pac. 606 (1927); Cf. Baar v. Smith, 201 Cal. 87, 99, Pac. 827 (1927).]

## III.

From November 20, 1928 until the death of Elizabeth J. Price on December 27, 1943 plaintiff was the owner of an undivided one-third interest in the 575 shares of common stock described above in Paragraph III of the findings of fact, and was likewise the owner of an undivided one-third interest in the 191 shares of Series "B" six per cent preferred stock and the 88 shares of common stock described above in Paragraph IV of the findings of fact.

## IV.

Since the death of Elizabeth J. Price on December 27, 1943, plaintiff has been, and at the commencement of this action was the owner of an undivided one-half interest in the 575 shares of common stock described above in Paragraph III of the findings of fact, and was likewise the owner of an undivided one-half interest in the 191 shares of Series "B" six per cent preferred stock and [51] the 88 shares of common stock described above in Paragraph IV of the findings of fact.

## V.

Dividend orders No. 12742 and No. 12743 constituted orders which were voidable under the law of California, as well as under the law of Missouri at the election of said minor within a reasonable time after reaching his majority.

## VI.

According to the law of California which governs this case [*Erie R. R. Co. v. Thompkins*, 304 U. S. 64, 78 (1938)], the validity of the dividend orders is to be determined by the law of Missouri where plaintiff executed them. [*Fenton v. Edwards*, 125 Cal. 43, 58 Pac. 320 (1899); Calif. Civ. Code, Sec. 3453; cf. Restatement, Conflict of Laws, Secs. 49, 255, 256, 283.]

## VII.

Inasmuch as plaintiff was a minor at the time he signed dividend orders No. 12742 and No. 12743, and plaintiff received no consideration for the execution of either of the dividend orders, and the nature of the documents and the purpose for which they were to be used was concealed from plaintiff at the time he signed said dividend orders and thereafter, plaintiff's disaffirmance of the dividend orders under the circumstances hereinabove set forth in the findings of fact was made within a reasonable time after reaching his majority.

## VIII.

From November 20, 1928 until the death of Elizabeth J. Price on December 27, 1943, plaintiff was the owner of, and was entitled to receive and be paid, one-third of all dividends declared and paid on the 575 shares of common stock described above in Paragraph III of the findings of fact, and on the 191 shares of preferred stock and 88 shares of common stock described above in Paragraph IV of

the findings of fact, together with one-third of [52] all stock rights declared and issued to the owners of said stock.

### IX.

Neither the four-year period of limitations specified in subsection 1 of Sec. 337, nor the two-year period of limitations specified in subsection 1 of Sec. 339 of the California Code of Civil Procedure commenced to run against plaintiff's cause of action asserted herein until after October 15, 1945, the date of plaintiff's demand of defendant for payment of his one-third share of all dividends and stock rights. Accordingly, plaintiff's cause of action herein is not barred by the applicable California statutes of limitations. [Macdermott v. Hayes 175 Cal. 95, 118, 170 Pac. 616 (1917); Ralston v. Bank, 112 Cal. 208, 44 Pac. 476 (1896); cf. Perkins v. Benguet Mining Co., supra, 55 Cal. App. (2d) at 770.]

### X.

The failure of plaintiff, after demand by defendant, to pursue his rights against George E. Burton and the Estate of Elizabeth J. Price, deceased, does not exonerate defendant from liability in this action.

### XI.

That pursuant to the provisions of Section 1475 of the Civil Code of the State of California, defendant discharged its obligations to the plaintiff herein as an owner in joint tenancy of stock in the defendant corporation by its payment of dividends

to, and delivery of stock rights to, or upon the order of, Elizabeth J. Price, joint tenant and joint obligee; that neither said dividends nor stock rights constituted "deposits" in the hands of the defendant and are, therefore, not controlled by the provisions of the California Civil Code relating to deposits.

## XII.

If Section 1475 of the California Civil Code were not [53] applicable in this case, plaintiff would be entitled to recover one-third of all dividends declared and set aside by defendant on the 575 shares of common stock described above in Paragraph III of the findings of fact, to-wit, the sum of \$5,036.04; together with the value of one-third of all stock rights declared and set aside to the owners of the 575 shares of stock, to-wit, the sum of \$1,783.46; together with one-third of all dividends declared and set aside by defendant on the 191 shares of preferred stock, to-wit, the sum of \$1,432.50, and the 88 shares of common stock described above in Paragraph IV, to-wit, the sum of \$785.40; together with one-third of the value of all stock rights declared and set aside to the owners of the 88 shares of common stock, to-wit, the sum of \$272.95; or the total sum of \$9,310.35, together with interest thereon at the rate of seven per cent per annum from October 15, 1945. [Telegraph Co. v. Davenport, 97 U. S. 369 (1878); Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936 (1915); Taft v. Presidio & F. R. Co., 84 Cal. 131, 24 Pac. 436

(1890) ]; but plaintiff would not be entitled to interest prior to the date of his demand on defendant for payment of the dividends, which demand was made on October 15, 1945. [Perkins v. Benguet Mining Co. supra, 55 Cal. App. (2d) at 765.]

Let judgment be entered for the defendant accordingly.

April 26, 1949.

/s/ WM. C. MATHES,

United States District Judge.

Approved as to form pursuant to Rule 7: April 25, 1949.

/s/ [Illegible.]

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EXHIBIT "A"

In the District Court of the United States  
For the District of Kansas

No. 4974

GEORGE E. BURTON,

Plaintiff

vs.

LESTER W. HURLEY and SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,  
a corporation,

Defendants

COMPLAINT

George E. Burton, who is a citizen of the State of Kansas residing at 1046 Ann Avenue in the City

of Kansas City, Wyandotte County, Kansas, brings his complaint against Lester W. Hurley, a citizen of the State of Missouri, who resides at 9522 Cloverhurst Drive, St. Louis County, Missouri, and against Southern California Edison Company, Limited, a corporation duly organized and existing under and by virtue of the laws of the State of California, and states:

1. The grounds upon which the jurisdiction of the Court depends are: diversity of citizenship between the parties hereto, and the amount in controversy herein exceeds \$3,000.00, and as grounds for jurisdiction in equity plaintiff avers that he seeks to quiet title to personal property upon the facts hereinafter particularly set out, and that in the premises he has no plain, adequate or complete remedy at law.

2. Plaintiff further states that he is the legal and equitable owner of and has the possession of the following described personal property, to-wit: 575 shares of common capital stock of Southern California Edison Company, Ltd., as evidenced by the following numbered certificates, to-wit:

- Certificate No. A9230 for 100 shares
- No. A9231 for 100 shares
- No. A9232 for 100 shares [55]
- No. A9233 for 100 shares
- No. A9234 for 100 shares
- No. AO61852 for 75 shares

3. That on February 19, 1929, pursuant to the

direction of and assignment by the then holders thereof, said certificates of stock were transferred to Elizabeth J. Price and George E. Burton, the plaintiff herein, as joint tenants thereof with full rights of survivorship, and said certificates were so held until December 27, 1943. That on said last mentioned date said Elizabeth J. Price died and thereupon said joint tenancy title terminated and this plaintiff became the owner thereof.

4. That thereafter the plaintiff herein through the Commercial National Bank of Kansas City, Kansas forwarded the above described certificates, properly endorsed for transfer on the transfer books of Southern California Edison Company, Ltd., to the individual name of the plaintiff herein with directions that said action be taken.

5. That said transfer was denied by said company for the reason that the defendant, Lester W. Hurley, had filed with said company an objection to said transfer on the alleged ground that the transfer of February, 1929, referred to herein, was obtained by fraud on said Lester W. Hurley and that said Lester W. Hurley claimed a lien upon or interest in said personal property.

6. That the exact nature of the claim of said Lester W. Hurley as basis for said objection is unknown to this plaintiff, but plaintiff alleges that any claim of the defendant Lester W. Hurley of a lien or interest, actual or contingent, in or to said personal property is inferior, subject and junior to the title of the plaintiff herein.

7. That said claim of the defendant Lester W. Hurley constitutes a cloud on plaintiff's title to said personal property, and the title of the plaintiff herein should be quieted as against all claims or demands of the said defendant, Lester W. Hurley, herein. \* [56]

8. That Southern California Edison Company, Ltd., has refused to make transfer of the certificates of stock mentioned herein to the name of this plaintiff until said alleged claim or lien of the defendant, Lester W. Hurley, in or to said personal property is settled or withdrawn.

Wherefore, plaintiff prays for the following relief: (1) A decree of Court excluding and barring the defendant Lester W. Hurley from any interest in, claim to or lien upon said personal property and quieting the title of the plaintiff to said personal property; (2) enjoining said defendant, Lester W. Hurley, from claiming any interest in or lien upon said personal property; (3) a decree of Court ordering and enjoining the defendant, Southern California Edison Company, Ltd., to transfer said shares of stock to the name of plaintiff herein upon presentation of said certificates. Plaintiff prays for such other and further relief as to the Court may seem just and equitable.

STANLEY, STANLEY,  
SCHROEDER, WEEKS &  
THOMAS

By LEE E. WEEKS

Attorneys for Plaintiff

1106 Huron Building

Kansas City 10, Kansas

Attest: A true copy. Filed June 2, 1944.

HARRY M. WASHINGTON,  
Clerk. [57]

EXHIBIT "B"

In the District Court of the United States for the  
District of Kansas, First Division.

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY and SOUTHERN CALI-  
FORNIA EDISON COMPANY, LTD.,

Defendants.

ANSWER AND CROSS-PETITION OF  
LESTER W. HURLEY.

Now comes Lester W. Hurley, a citizen and resi-  
dent of the State of Missouri, and for his answer  
and cross-petition alleges and states:

First Defense.

1. Defendant Lester W. Hurley admits the al-  
legations of jurisdiction stated in Paragraph 1 of  
plaintiff's complaint and allegations stated in Para-  
graph 5; denies the allegations stated in paragraph  
2 insofar as it is alleged that plaintiff is the legal  
and equitable owner of 575 shares of stock de-  
scribed; denies the allegation stated in paragraph  
3 insofar as it is alleged that the certificates de-

scribed in paragraph 2 were transferred to Elizabeth J. Price and George E. Burton on February 19, 1929, as joint tenants with full rights of survivorship. Admits, however, that Elizabeth J. Price died on December 27, 1943, but denies that thereupon George E. Burton became the owner of the certificates described in paragraph 2 of plaintiff's complaint; also denies the allegations stated in paragraphs 6 and 7; allege that defendant Hurley is without knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraphs 4 and 8. Further denies each and every other allegation contained in said complaint. [58]

#### Second Defense.

2. Defendant Lester W. Hurley alleges that on November 28, 1928, there was duly issued by defendant corporation to Elizabeth J. Price, George E. Burton and Lester Hurley as joint tenants with full rights of survivorship, 575 shares of common stock in defendant corporation, being certificates No. AO-59630, AO-59635, and A-8752 to 8756 inclusive; that on November 20, 1928, Lester Hurley became the owner of said stock in joint tenancy with Elizabeth J. Price and George E. Burton, with full rights of survivorship.

3. Defendant further alleges that he was not informed and did not know that the said stock was so issued to him and never learned said fact until on or about March 18, 1944; that defendant Hurley has not sold, transferred or assigned all or any

part of his interest in said stock; that the certificates issued on February 19, 1929, were issued without his authorization, knowledge or consent.

4. Defendant further alleges that on February 19, 1929, he was a minor under the age of 21 years unmarried, and living with his father; that he has no recollection or memory of endorsing or assigning all or any one of the last above described certificates and denies that he endorsed said certificates or any one of them; alleges that he received no consideration for said purported endorsement or assignment.

5. Defendant further states that if all or any one of said certificates bears his genuine signature the same was procured and obtained by George E. Burton and Elizabeth J. Price through fraud, artifice, deceit and misrepresentation of such a character that he did not know and did not understand the purpose or object for which said signatures [59] were procured; that in no event were all or any one of said signatures placed upon said certificates as his voluntary, free act and deed for the purpose of transferring or assigning all of any part of his interest in and to said stock; that said purported assignments were promptly disaffirmed and repudiated upon learning of their existence.

Wherefore, having fully answered, defendant prays that plaintiff's complaint be dismissed and that plaintiff take nothing by reason thereof, and that defendant have and recover his costs and charges herein expended.

Cross-Petition.

6. Defendant further states that George E. Burton is the son of Elizabeth J. Price; that George E. Burton is the uncle of Lester W. Hurley; that Elizabeth J. Price is now deceased, having departed this life on December 27, 1943.

7. Defendant further states that William Price, the former husband of Elizabeth J. Price was during his lifetime the owner of a substantial amount of stock in the Southern California Edison Company, Ltd.; that on November 20, 1928, under the direction of William Price there were issued to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants with full rights of survivorship, certificates No. AO-59630, AO-59635 and A-8752 to A-8756 inclusive, which certificates totaled 575 shares of common stock in the Southern California Edison Co., Ltd., of the par value of \$25.00 per share; that at the time said stock was issued William Price resided in California and defendant resided in Kansas City, Missouri.

8. Defendant further states that thereupon the said Elizabeth J. Price, George E. Burton and Lester Hurley became the owners, in joint tenancy with full rights of survivorship, of all of said stock represented by the above [60] designated certificates; that said certificates so issued were delivered to Elizabeth J. Price.

9. Defendant further states that at no time were said certificates in the possession or control of Lester Hurley; that at no time were said certificates

presented to or examined by Lester Hurley, defendant herein.

10. Defendant further states that thereafter and on January 5th, 1929, William Price died, and was survived by his then wife, Elizabeth J. Price.

11. Defendant further states that promptly following the death of William Price, and for the purpose of cheating and defrauding the plaintiff out of his entire right, ownership and interest in and to the aforesaid 575 shares of common stock and the certificates No. A-8752 to A-8756 inclusive, and certificates AO-59635 and AO-59630 representing said stock, the said Elizabeth J. Price and George E. Burton did on the 19th day of February, 1929, present to the defendant corporation the aforesaid seven certificates, purporting to bear on the back of each certificate an assignment and power of attorney authorizing the defendant company to transfer said certificates to Elizabeth J. Price and George E. Burton, as joint tenants with full rights of survivorship, thereby attempting to eliminate and destroy all the right, title and ownership of defendant therein.

12. Defendant further states that on February 19, 1929, the above designated certificates were cancelled on the books of defendant company, and certificates No. AO-61852 and A-9230 to A-9234 inclusive, for 575 shares of common stock in defendant company, of the par value of \$25.00 per share, were issued to Elizabeth J. Price and George E. Burton, as joint tenants with full right of survivorship, in

the place and stead of the first above [61] designated certificates.

13. Defendant further states that said purported assignment and power of attorney was and is void and of no force and effect to bind the defendant herein or effect an assignment or transfer of said shares or authorize and empower the defendant corporation to cancel the same and issue new stock in lieu thereof; that defendant Hurley at no time executed or authorized the execution of all or any one of the purported powers of attorney and assignments appearing on the back of the aforesaid certificates; that said certificates bearing said purported assignment and power of attorney were never at any time presented to the defendant for his signature and were not signed by him; that the purported signatures of Lester Hurley appearing on the back of each of said certificates is a forgery; that no consideration of any kind or character was at any time paid to or received by defendant Hurley for the purported execution of the aforesaid assignment and power of attorney; that at the time said purported assignment was made the defendant herein was a minor under the age of 21 years and residing with his father, William Hurley at 5716 Scarritt Avenue, Kansas City, Missouri.

14. Defendant Hurley adopts by reference the allegations contained in paragraph 5 hereof.

15. Defendant further states that during the lifetime of Elizabeth J. Price, the defendant was never given any information as to the existence of the

aforesaid 575 shares of stock; that he had no knowledge or information as to the name or names in which the above designated 575 shares of stock stood; that defendant was led to believe by Elizabeth J. Price and George E. Burton that some stock in the defendant company might come to the defendant upon the[62] death of Elizabeth J. Price if and provided Elizabeth J. Price did not prior to her death direct otherwise; that the fact that the above described 575 shares of stock in the defendant corporation had been transferred to Lester Hurley by William Price on November 20, 1928, in joint tenancy with Elizabeth J. Price and George E. Burton with full rights of survivorship, was carefully secreted and at no time disclosed.

16. Defendant further states that in furtherance of the scheme and conspiracy aforesaid, to cheat and defraud the defendant out of his legal and lawful interest in said stock, Elizabeth J. Price and her son, George E. Burton promptly following the death of William Price, engaged in a program of deceit and misrepresentation to cover up the transfer to themselves of defendant's entire interest in said stock; that at about the time said stock was transferred to defendant on November 20, 1928, it was represented to defendant by Elizabeth J. Price and George E. Burton (and plaintiff was led to believe and did believe) that Elizabeth J. Price had made some arrangement with the defendant corporation by which she was to draw all dividends during her lifetime on stock owned by her in said company and

that upon her death the defendant might receive some benefit or interest in said stock, the exact nature and amount to depend upon her feeling toward defendant up to the time of her death; that defendant was led to believe and made to understand that any effort on his part to inquire into her business affairs or financial arrangements would result in unfavorable consideration of defendant by Elizabeth J. Price in the disposition of the stock owned by her in the defendant corporation; that defendant was led to believe and did believe that Elizabeth J. Price's imperious manner and[63] intense resentment at the slightest inquiry by plaintiff as to her financial arrangements was merely a part of her personality.

. 17. Defendant further states that the representation so made to the defendant by Elizabeth J. Price and George E. Burton that whatever interest or benefit he might derive from stock in defendant company at any time owned by her or William Price would depend on her feeling toward him at the time of her death was false, fraudulent and untrue and known by Elizabeth J. Price and George E. Burton to be untrue when made; that said representations were made for the purpose of controlling the defendant and deceiving him as to his interest and ownership in the aforesaid 575 shares of stock; that said representations were further made to prevent the defendant from asking any questions or making any inquiry that might bring to light or disclose defendant's ownership and interest in and to the

aforesaid stock and the fraudulent transfer attempted on February 19, 1929; that Elizabeth J. Price and George E. Burton well knew that the ownership of the 575 shares of stock was vested in the defendant on November 20, 1928, in joint tenancy with Elizabeth J. Price and George E. Burton and that his rights therein in no way depended upon the will, humor or caprice of Elizabeth J. Price; that said pretense that his ultimate interest would depend upon the will and favor of Elizabeth J. Price was maintained through the years in order that the defendant might be made to feel that any act or inquiry by defendant that was displeasing to Elizabeth J. Price would result in the loss by defendant of any benefits which he might otherwise secure; that as a result of said deceit and misrepresentations defendant made no inquiry concerning said stock in defendant company until after the death of Elizabeth [64] J. Price.

18. Defendant further states that upon the death of Elizabeth J. Price, George E. Burton informed the defendant herein that he was the owner, in joint tenancy with George E. Burton, of 191 shares of preferred stock in defendant company represented by certificates No. A-10216, AO-86998, and AO-87011, and 88 shares of common stock represented by certificates No. AO-59759 and AO-59770; that shortly thereafter George E. Burton requested the defendant to endorse the last above designated certificates in blank and deliver said certificates to the said George E. Burton, which defendant on advice of counsel refused to do.

19. Defendant further states that since the death of Elizabeth J. Price, defendant George E. Burton has continued his efforts to keep the existence of said 575 shares of stock secret; that although George E. Burton filed in the Probate Court of Wyandotte County, Kansas, on January 5, 1944, an inventory purporting to list the stock held by Elizabeth J. Price and George E. Burton in joint tenancy at the time of the death of Elizabeth J. Price and did list 323 shares of stock so held, nevertheless the 575 shares of stock were secreted and not disclosed and were entirely omitted from said inventory.

20. Defendant further states that by reason of the actions and conduct of George E. Burton and on the advice of counsel, an application was made to defendant company for a report as to what the stock record of said company showed as to his ownership and interest in and to stock in said company; that upon the receipt of said report in March 1944, defendant learned for the first time that the aforesaid 575 shares of stock were placed in his name on November 20, 1928, and thereafter cancelled on the books of defendant [65] company and certificates AO-61852 and A9230 to A-9234 inclusive, were issued to Elizabeth J. Price and George E. Burton on February 19, 1929 in the place and stead of said cancelled certificates.

21. Defendant further states that thereupon defendant gave prompt notice by telegraph to defendant company that said transfer on February 19,

1929, was illegal, unlawful and void and made without his knowledge and consent; that said purported transfer was disaffirmed and repudiated by defendant on March 19, 1944.

22. Defendant further states that he has never parted with his ownership or interest in the 575 shares represented by certificates A-8752 to A-8756 inclusive, and certificates AO-59635 and AO-59630; that certificates No. AO-61852 and A-9230 to A-9234 inclusive, were issued to Elizabeth J. Price and George E. Burton illegally and unlawfully on February 19, 1929, without the surrender of certificates No. A-8752 to A-8756 inclusive, and certificates AO-59635 and AO-59630, duly and legally endorsed by him; that said certificates issued on February 19, 1929, are void and should be cancelled and for naught held.

23. Defendant further states that he is still the lawful owner in joint tenancy with George E. Burton of certificates A-8752 to A-8756 inclusive, and AO-59635 and AO-59630 and that said certificates should be reinstated on the books of the defendant company by the issuance of new certificates for 575 shares of common stock in the name of George E. Burton and Lester Hurley as joint tenants with full right of survivorship, as evidence of said ownership and interest.

24. Defendant further states that he is without a complete and adequate remedy at law and must depend upon [66] the equitable jurisdiction of this court to relieve him from the cloud placed on his

title and ownership in the 575 shares of stock issued on November 20, 1928, and to protect and maintain his rights and ownership in joint tenancy with full rights of survivorship, as well as to prevent the further transfer on books of defendant company, or the assignment by George E. Burton of the certificates illegally issued to him and Elizabeth J. Price on February 19, 1929; that defendant will suffer irreparable loss, injury and damage unless defendants are restrained and enjoined by this court from assigning or transferring said illegal certificates, now in the hands of George E. Burton, and unless said illegal certificates are by this court ordered cancelled and for naught held.

Wherefore, Defendant Lester W. Hurley prays that this court find and direct:

1. That the defendants and each of them be enjoined from proceeding directly or indirectly in any manner with the transfer or assignment of certificates AO-61852, A-9230 to A-9234 inclusive.

2. That the court decree that the aforesaid certificates number AO-61852, A-9230 to A-9234 inclusive bearing date of February 19, 1929, be declared illegal and void and that the same be cancelled and for naught held.

3. That the plaintiff be ordered and directed to surrender said cancelled certificates number AO-61852, A-9230 to A-9234 inclusive to the defendant, Southern California Edison Company, Ltd., with directions from the plaintiff herein that the original certificates A-8752 to A-8756 inclusive, and AO-

59635 and AO-59630 be reissued in their original form or that equivalent certificates be issued therefor. [67]

4. That defendant company be ordered and directed to reinstate on the books of the company the 575 shares of stock represented by certificates A-8752 to A-8756 inclusive, and AO-59635 and AO-59630, and as evidence of the reinstatement thereof that said company be ordered to issue new certificates to George E. Burton and Lester Hurley for 575 shares of common stock, in joint tenancy with full rights of survivorship, of the par value of \$25.00 per share, and that plaintiff have such further and other relief as he may in equity and good conscience be entitled, together with his costs and charges herein expended.

THURMAN L. McCORMICK,  
RICE, MILLER & HYATT,

Attorneys for

Lester W. Hurley.

Received copy of the above Answer and Cross-Petition this 11th day of July, 1944, and service of the same is hereby acknowledged.

STANLEY, STANLEY,  
SCHROEDER, WEEKS &  
THOMAS,

By SCHROEDER,

Attorneys for Plaintiff.

EXHIBIT "C"

In the District Court of the United States  
for the District of Kansas

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY,

Defendant.

PLAINTIFF'S ANSWER TO CROSS-PETITION OF DEFENDANT, LESTER W. HURLEY

Comes now George E. Burton, plaintiff, and for his answer to the cross-petition of defendant, Lester W. Hurley, states:

1. Plaintiff admits the allegations in the paragraphs of the cross-petition numbered 6, 7, 10 and 12.

2. Plaintiff denies the allegations in the paragraphs of the cross-petition numbered 13, 14, 15, 16, 17, 22, 23 and 24.

3. Plaintiff has no information or knowledge thereof sufficient to form a belief as to the truth of the allegations in the paragraphs of the cross-petition numbered 9 and 20.

4. Plaintiff denies the allegations in the paragraph of the cross-petition numbered 8 and alleges that the stock certificates referred to therein were issued in the names of Elizabeth J. Price, George

E. Burton and Lester Hurley as joint owners with full rights of survivorship through a mistake on the part of officers and agents of Southern California Edison Company, Limited, and that in truth and in fact the said officers and agents of the said Southern California Edison Company, Limited, had been directed by William Price and Elizabeth J. Price, the owners [69] of the stock represented by said certificates, to issue the said certificates to Elizabeth J. Price and George E. Burton in joint ownership with full rights of survivorship.

5. Plaintiff denies the allegations in the paragraph of the cross-petition numbered 11 and alleges that on a date in February, 1929, the exact date being unknown to plaintiff, but prior to the 19th day of February, 1929, the defendant Lester W. Hurley, for the purpose of correcting the mistake of the officers and agents of the Southern California Edison Company, Limited, as alleged in the preceding paragraph, did make and execute assignments and powers of attorney authorizing the transfer of the stock referred to in paragraph number 11 of defendant's cross-petition to Elizabeth J. Price and this plaintiff as joint owners with full rights of survivorship.

6. Plaintiff admits the allegations in the paragraph of the cross-petition numbered 18 that shortly after the death of Elizabeth J. Price on December 27, 1943, plaintiff informed the defendant Lester W. Hurley that plaintiff and defendant were joint owners of 191 shares of preferred stock in the

Southern California Edison Company, Limited, represented by certificates Nos. A-10216, AO-86998 and AO-87011, and 88 shares of common stock of the same company represented by certificates Nos. AO-59759 and AO-59770; and that plaintiff requested defendant to join with him in assignments and powers of attorney for the purpose of authorizing them to divide the stock between plaintiff and defendant by issuing separate certificates to each.

7. Plaintiff denies the allegations in the paragraph of the cross-petition numbered 19 and alleges the facts to be that the inventory referred to in said paragraph did not purport to list all stock held by Elizabeth J. Price [70] and plaintiff as joint owners at the time of the death of Elizabeth J. Price, but that the said inventory was an inventory of the contents of a safe deposit box and did list all stock found in the said safe deposit box at the time that it was opened by plaintiff and a representative of the Probate Court of Wyandotte County, Kansas.

8. Plaintiff has no information or knowledge sufficient to form a belief as to the truth of allegations in the paragraph of the cross-petition numbered 21, except that plaintiff has been informed by the Southern California Edison Company, Limited, that defendant Lester W. Hurley had notified the said company that he claimed that the transfer of stock made on February 19, 1929, was made without his knowledge and consent.

9. Plaintiff denies each and every allegation contained in said cross-petition except those herein specifically admitted to be true.

10. For a further separate and distinct defense to said cross-petition plaintiff alleges that all and every of the matters alleged in the cross-petition are matters which may be tried and determined at law and with respect to which defendant is not entitled to any relief from a court of equity, as the defendant has a complete and adequate remedy at law for damages against plaintiff; that plaintiff is financially solvent and able to respond in damages.

11. For a further separate and distinct defense to said cross-petition plaintiff alleges that by the provisions of Section 60-306 of the General Statutes of the State of Kansas, in which State the alleged cause of action accrued, it is provided that an action for taking personal property including actions for the specific recovery of personal property or an action for injury to the rights of another not arising on contract or an action for relief on the ground of fraud can only be brought within two years after the cause of action accrued; except that the cause of action in cases of fraud shall not be deemed to have accrued until the discovery of the fraud; that defendant has known all of the facts surrounding the transfer of stock represented by the certificates of stock in the Southern California Edison Company, Limited, bearing numbers A9230, A9231, A9232, A9233, A9234 and AO61852, since the month of February, 1929; that the cause of action stated in said cross-petition, which arose and accrued in said State of Kansas, so accrued more than two years before the commencement of this

action and was, when commenced, wholly barred and extinguished by the statute of said State before the commencement of this action and before the filing of defendant's cross-petition herein; that during all of the time after the said cause of action accrued this plaintiff has resided continuously in the State of Kansas and was there at all times amenable to service upon him of civil process and was in said State when the said cause of action was extinguished by the running of the statute of limitations. That by the provisions of Section 60-307 of the General Statutes of the State of Kansas it is provided that if a person entitled to bring an action other than for the recovery of real property, except for a penalty or a forfeiture, be at the time the cause of action accrued under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed.

12. For a further separate and distinct defense to said cross-petition plaintiff alleges that if defendant ever had any cause of action against this plaintiff by reason of any of the allegations in said cross-petition, [72] such cause of action accrued about fifteen years before the filing of said cross-petition, as appears on the face of said cross-petition, and is long since barred by laches and should not now be permitted to be asserted in a court of equity.

Wherefore, having fully answered the cross-petition herein, plaintiff renews the prayer of his

complaint and further prays that defendant's cross-petition be dismissed and that defendant take nothing by reason thereof.

STANLEY, STANLEY,  
SCHROEDER, WEEKS &  
THOMAS,  
Attorneys for Plaintiff.

Service of copy acknowledged this 30th day of November, 1944, and consent to file out of time granted.

RICE, MILLER & HYATT,  
Attorneys for Defendant.

EXHIBIT "D"

In the District Court of the United States  
for the District of Kansas

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Now on this day this cause having been heretofore taken under advisement and the Court now being

fully advised, makes specific findings of fact and conclusions of law, as follows:

Findings of Fact

1. That upon the death of William Price on January 5, 1929, five hundred seventy-five (575) shares of stock in the Southern California Edison Company, Ltd. represented by certificates dated November 20, 1928, and bearing numbers AO59630, AO59635 and A8752 to A8756 inclusive, were owned by Elizabeth J. Price, George E. Burton and Lester Hurley as joint tenants with full rights of survivorship.

2. That Elizabeth J. Price died on the 27th day of December, 1943.

3. That upon February 19, 1929, there was issued by the Southern California Edison Company, Ltd. certificates bearing numbers AO61852 and A9230 to A9234 inclusive, for five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Ltd. to Elizabeth J. Price and George E. Burton with full rights of survivorship, without the surrender of certificates dated November 20, 1928, bearing numbers AO59630, AO59635 and A8752 to A8756 inclusive, properly endorsed.

4. That January 19, 1929, was Saturday and the Brotherhood State Bank of Kansas City, Kansas, closed at 12 o'clock noon on said day.

5. That none of said purported "Assignments and Irrevocable Powers of Attorney" attached to each of the certificates designated in paragraph 1 hereof bear the true and genuine signature of Les-

ter W. Hurley, but that each of said signatures of Lester W. Hurley appearing thereon is a forgery.

6. That no consideration of any character was ever paid by Elizabeth J. Price or George E. Burton to Lester W. Hurley, nor was any consideration of any character ever received by Lester W. Hurley from any other source for the transfer of the interest of Lester W. Hurley in the five hundred seventy-five (575) shares of stock described in paragraph 1 hereof.

7. That Lester W. Hurley had no knowledge that he owned or had any interest in the certificates designated in paragraph 1 hereof representing five hundred seventy-five (575) shares of stock in the Southern California Edison Company Ltd. until March 18, 1944.

8. That at the time of the aforesaid attempted transfer of the above designated stock certificates Lester W. Hurley was a minor under the age of twenty-one (21) years.

9. That upon March 20, 1944, Lester W. Hurley disaffirmed the purported transfer of the above designated stock certificates, which disaffirmance was made within a reasonable time after reaching his majority.

10. That the dividend order dated November 19, 1928, [75] and filed with the Southern California Edison Company, Limited, on December 11, 1928, does not bear the true and genuine signature of Lester Hurley, but that the purported signature of Lester Hurley appearing thereon is a forgery.

11. That the statements and conduct of Elizabeth J. Price and George E. Burton were calculated to and did conceal from the defendant herein the fact that he was the owner of an interest in the above designated five hundred seventy-five (575) shares of stock represented by the aforesaid certificates as well as the fact that an attempt had been made on January 19, 1929, to transfer said stock to Elizabeth J. Price and George E. Burton as Joint tenants with full rights of survivorship.

12. That Lester W. Hurley had no knowledge that the dividend order dated November 19, 1928, existed until March 18, 1944.

#### Conclusions of Law

1. That defendant, Lester W. Hurley, is in no manner bound by the "Assignment and Irrevocable Power of Attorney" attached to each of the certificates of stock issued by the Southern California Edison Company, Limited, on November 20, 1928, being certificates numbered AO59630, AO59635 and A8752 to A8756, inclusive, as said assignments and each of them are void and of no force and effect.

2. That the defendant, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in the aforesaid five hundred seventy-five (575) shares of common stock of the Southern California Edison Company, Limited, or to two hundred eighty seven and one half shares of said stock.

3. That the issue of stock certificates dated February 19, 1929, bearing numbers AO61852 and

A9230 to A9234 [76] inclusive, were fraudulently procured and are therefore void.

4. That Lester W. Hurley is in no manner bound by the dividend order dated November 19, 1928, and that said dividend order, insofar as it purports to be an order on the part of Lester W. Hurley to pay said dividends to Elizabeth J. Price, is void and of no force or effect.

EDGAR S. VAUGHT,  
U. S. District Judge.

Approved:

THURMAN L. McCORMICK,  
RICE, MILLER & HYATT,  
By THOMAS C. LYSAUGHT,  
Attorneys for Defendant.

Service of copy of the within Findings of Fact and Conclusions of Law prepared by attorneys for defendant acknowledged this 21st day of June, 1945.

STANLEY, STANLEY,  
SCHROEDER, WEEKS  
& THOMAS,  
By ARTHUR J. STANLEY, JR.,  
Attorneys for Plaintiff.

Filed July 26, 1945.

/s/ HARRY M. WASHINGTON,  
Clerk.

In the District Court of the United States  
For the District of Kansas

Civil Action No. 4974

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY,

Defendant.

### JUDGMENT

Now on this day, this cause having heretofore been fully heard by the Court (a jury having been duly waived) and thereafter taken under advisement and the Court now being fully advised finds the issues herein and each of them in favor of the defendant, Lester W. Hurley and against the plaintiff, George E. Burton.

It Is Therefore Ordered, Adjudged and Decreed by the Court that Defendant, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in and to five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited.

It Is Further Ordered, Adjudged and Decreed by the Court that certificates dated February 19, 1929, and bearing numbers AO61852 and A9230 to A9234 inclusive, for five hundred seventy-five (575) shares of common stock of the Southern California Edison Company, Limited, be and the same are hereby cancelled and for naught held; that said

plaintiff, George E. Burton, be and he is hereby ordered and directed to surrender and deliver the last-above designated certificates to the Southern California Edison Company, Limited, within 20 days from the date of the filing [78] of this decree, with instructions from George E. Burton to the Southern California Edison Company, Limited, to issue in the place and stead thereof new certificates for two hundred eighty-seven and one-half ( $287\frac{1}{2}$ ) shares of common stock in the Southern California Edison Company, Limited, to Lester W. Hurley.

It Is Further Ordered, Adjudged and Decreed by the Court that title to the remaining and unappropriated two hundred eighty-seven and one-half ( $287\frac{1}{2}$ ) shares of common stock in the Southern California Edison Company, Limited, including therein the pledged stock, if any, shall vest in George E. Burton.

It Is Further Ordered, Adjudged and Decreed by the Court that the defendant, Lester W. Hurley, have and recover his costs and charges herein expended and have execution for the enforcement of the terms and provisions of this judgment.

Dated this 24 day of July, 1945.

Enter

EDGAR S. VAUGHT,  
Judge Assigned.

Foregoing Journal entry approved as to form. Parties hereto stipulate that this journal entry of judgment may be signed by the Court during his

absence from the jurisdiction of the Judicial District in which this cause was tried.

STANLEY, STANLEY,  
SCHROEDER, WEEKS  
& THOMAS,

By LEE E. WEEKS,  
Attorneys for Plaintiff,

THURMAN L. McCORMICK,  
RICE, MILLER & HYATT,

By THOMAS C. LYSAUGHT,  
Attorneys for Defendant.

Filed July 26, 1945.

HARRY M. WASHINGTON,  
Clerk.

(Affidavit of Service by Mail attached.)

Approved as to form: April 22, 1949.

/s/ [Illegible]

Attorney for Plaintiff.

[Endorsed]: Filed April 26, 1949. [79]

In the District Court of the United States, South-  
ern District of California, Central Division  
No. 5187-WM Civil

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a corporation,

Defendant.

### JUDGMENT

The court having made and filed findings of fact and conclusions of law herein, and having ordered entry of judgment in accordance therewith,

It Is Now Ordered, Adjudged and Decreed that plaintiff, Lester W. Hurley, take nothing by his complaint herein and that defendant, Southern California Edison Company, Limited, a corporation, have judgment for its costs in this action incurred as taxed by the clerk in the sum of \$21.50.

April 26, 1949.

/s/ WM. C. MATHES,

U. S. District Judge.

Judgment entered Apr. 28, 1949.

Docketed Apr. 28, 1949.

Book 57, Page 740.

EDMUND L. SMITH,

Clerk,

By /s/ THEODORE HOCKE,

Deputy.

[Endorsed]: Filed April 26, 1949. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY  
LESTER W. HURLEY

Notice is hereby given that Lester W. Hurley, the above named plaintiff hereby appeals to the Court of Appeals for the 9th Circuit from the final judgment entered in this action on April 28, 1949, in Judgment Book number 57, page 740.

Notice is further given that this appeal is taken from and specifically limited to that part of the judgment above designated which is based upon the following conclusions of law wherein the Court declared the law to be:

XI.

“That pursuant to the provisions of Section 1475 of the Civil Code of the State of California, defendant discharged its obligations to the plaintiff herein as an owner in joint tenancy of stock in the defendant corporation by its payment of dividends to, and delivery of stock rights to, or upon the order of, Elizabeth J. Price, joint tenant and joint obligee; that neither [82] said dividends nor stock rights constituted “deposits” in the hands of the defendant and are, therefore, not controlled by the provisions of the California Civil Code relating to deposits.”

XII.

“. . . Plaintiff would not be entitled to interest prior to the date of his demand on defendant for payment of the dividends, which demand was made

on October 15, 1945. (*Perkins v. Benguet Mining Co.*, supra, 55 Cal. App. (2d) at 765.

Let judgment be entered for the defendant accordingly.”

Signed and dated this 25th day of May, 1949.

/s/ FRANK M. GUNTER,

/s/ THURMAN L. McCORMICK,

Attorneys for Appellant

Lester W. Hurley.

[Endorsed]: Filed May 25, 1949. [83]

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[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON BY  
APPELLANT, LESTER W. HURLEY

I.

Payment to one of several joint tenants has not been so pleaded by defendant as to properly raise the issue and place it before the Court in such manner that defendant is entitled to rely thereon as a defense.

II.

Defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of the fraud practiced on the plaintiff as a co-tenant.

III.

When a dividend is declared it is immediately severed from the stock, and title thereto vests in

each stockholder individually and not as a joint tenant, regardless of how the stock may have been held. [84]

#### IV.

Defendant knew or had reason to know of the forgery and fraud perpetrated upon the plaintiff by Elizabeth J. Price and George E. Burton through notice both actual and constructive.

#### V.

The defendant had actual knowledge as a matter of law that Hurley was being excluded from the dividends on the 575 common shares, and this exclusion is the "fraud" that is referred to in the exception read into section 1475 by the decisions.

#### VI.

The exception expressly stated in section 1475 as to deposits precludes reliance on the section in the case at bar. As to dividends on the 188 and 191 shares of stock the defendant not only had reason to know that Hurley was being excluded from said dividends, but actually secreted and failed to disclose information concerning said dividends, thereby making said exclusion possible.

#### VII.

The stock dividends clearly do not fall within section 1475 and the issuance and delivery of said warrants to Elizabeth J. Price in violation of defendant's own resolutions and the warrants representing the same, takes said stock dividends out of

section 1475 by reason of fraud practiced by defendant.

/s/ THURMAN L. McCORMICK,  
Attorney for Appellant.

Received copy of the above Statement of Points relied on by Lester W. Hurley, together with copy of Designation of the Record to be prepared by the clerk of the court in behalf of Lester W. Hurley, this 25th day of May, 1949.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorney for Appellee.

[Endorsed]. Filed May 25, 1949. [85]

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[Title of District Court and Cause.]

DESIGNATION OF THE RECORD TO BE  
PREPARED BY THE CLERK ON BE-  
HALF OF LESTER W. HURLEY, APPEL-  
LANT

Now comes the plaintiff, Lester W. Hurley, and directs the clerk of the United States District Court, Southern District of California, Central Division, to prepare and transmit to the appellate court a true copy of the following parts of the record appearing in the above entitled cause in said court, to-wit:

1. Plaintiff's petition.
2. Defendant's answer and supplemental answer.

3. Findings of fact made in said cause by the United States District Court.

4. Conclusions of law made and entered in said cause by the United States District Court.

5. Judgment entered in said cause on April 28, 1949.

6. Pre-trial stipulation entered in the above entitled cause by and between the respective attorneys of record, dated June 11, 1946. [86]

7. Notice of Appeal.

8. Statement *on* points on which Lester W. Hurley intends to rely on appeal.

Signed and dated this 24 day of May, 1949.

/s/ THURMAN L. McCORMICK,  
Attorney for Appellant.

[Endorsed]: Filed May 25, 1949. [87]

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[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 87, inclusive, contain the original Complaint for Accounting; Answer of Defendant; Pre-Trial Stipulation; Supplemental Answer of Defendant; Findings of Fact and Conclusions of Law after New Trial; Judgment; Notice of Appeal; Statement of Points Relied on by Appel-

lant; and Designation of the Record to be Prepared by the Clerk on Behalf of Lester W. Hurley, Appellant which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23 day of June, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

---

[Endorsed]: No. 12278. United States Court of Appeals for the Ninth Circuit. Lester W. Hurley, Appellant, vs. Southern California Edison Company, Limited, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 24, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 12278

LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

Appellee.

DESIGNATION OF THE RECORD ON BE-  
HALF OF LESTER W. HURLEY, APPEL-  
LANT

Now comes the Appellant, Lester W. Hurley, and designates as necessary and material to the consideration of this appeal and a review by this Court the following parts of the Record, to-wit:

1. Plaintiff's Petition.
2. Defendant's answer and supplemental answer.
3. Findings of fact made in said cause by the United States District Court, including all exhibits incorporated therein by reference.
4. Conclusions of law made and entered in said cause by the United States District Court.
5. Judgment entered in said cause on April 28, 1949.
6. Pre-trial stipulation entered in the above-entitled cause by and between the respective attorneys of record, dated June 11, 1946.
7. Notice of Appeal.

8. Statement of points on which Lester W. Hurley intends to rely on appeal.

Signed and dated this 9th day of September, 1949.

/s/ HAROLD EASTON,  
/s/ THURMAN L. McCORMICK,  
Attorneys for Appellant.

[Endorsed]: Filed Sept. 15, 1949.

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[Title of Court of Appeals and Cause.]

STATEMENT OF ADDITIONAL POINT RELIED ON BY APPELLANT LESTER W. HURLEY

IX.

Defendant was chargeable with knowledge that plaintiff was a minor and plaintiff had a right to and did disaffirm the transactions promptly upon learning of them.

THURMAN L. McCORMICK  
and  
HAROLD EASTON.  
By /s/ HAROLD EASTON,  
Attorneys for Appellant,  
Lester W. Hurley.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Sept. 15, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED ON BY  
APPELLANT, LESTER W. HURLEY

I.

Payment to one of several joint tenants has not been so pleaded by defendant as to properly raise the issue and place it before the Court in such manner that defendant is entitled to rely thereon as a defense.

II.

Defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of the fraud practiced on the plaintiff as a co-tenant.

III.

When a dividend is declared it is immediately severed from the stock, and title thereto vests in each stockholder individually and not as a joint tenant, regardless of how the stock may have been held.

IV.

Defendant knew or had reason to know of the forgery and fraud perpetrated upon the plaintiff by Elizabeth J. Price and George E. Burton through notice both actual and constructive.

V.

The defendant had actual knowledge as a matter of law that Hurley was being excluded from the dividends on the 575 common shares, and this exclu-

sion is the "fraud" that is referred to in the exception read into section 1475 by the decisions.

## VI.

The exception expressly stated in section 1475 as to deposits precludes reliance on the section in the case at bar. As to dividends on the 188 and 191 shares of stock the defendant not only had reason to know that Hurley was being excluded from said dividends, but actually secreted and failed to disclose information concerning said dividends, thereby making said exclusion possible.

## VII.

The stock dividends clearly do not fall within section 1475 and the issuance and delivery of said warrants to Elizabeth J. Price in violation of defendant's own resolutions and the warrants representing the same, takes said stock dividends out of section 1475 by reason of fraud practiced by defendant.

## VIII.

That the trial court erred in that part of its conclusion of law designated as Conclusion of Law XII, in that it failed and refused to allow interest on dividends wrongfully paid to Elizabeth J. Price prior to the date of demand for said payment. Since a prior demand would have been a vain and useless act, such demand under the law was waived, and appellant is entitled to interest on each dividend

from the date said dividend was declared and set aside for payment.

/s/ HAROLD EASTON,  
/s/ THURMAN L. McCORMICK,  
Attorneys for Appellant,  
Lester W. Hurley.

Received copy of the above and foregoing Statement of Points Relied on by Appellant Lester W. Hurley, together with a copy of Appellant's Designation of the record necessary to the consideration of said appeal in the United States Court of Appeals for the Ninth Circuit, this 12th day of September, 1949.

By /s/ CAROL G. WYNN,  
Attorney for Appellees.

[Endorsed]: Filed Sept. 15, 1949.



In the  
**United States Court of Appeals**  
For the Ninth Circuit.

---

LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED,

Appellee.

---

**BRIEF ON BEHALF OF APPELLANT.**

---

Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

---

THURMAN L. McCORMICK,  
910 Rialto Building, K.C., Mo.,  
HAROLD EASTON,  
633 Roosevelt Building,  
Los Angeles 14, California,  
*Attorneys for Appellant.*



In the  
**United States Court of Appeals**  
For the Ninth Circuit.

---

LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED,

Appellee.

---

**BRIEF ON BEHALF OF APPELLANT.**

---

Appeal from the United States District Court for the  
Southern District of California,  
Central Division.



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## STATEMENT OF JURISDICTION

At the time of the commencement of this action and at all times herein mentioned, plaintiff was a citizen and resident of the State of Missouri.

At the time herein mentioned, defendant was a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business located in Los Angeles, California.

The amount in controversy between plaintiff and defendant in this action, exclusive of interest and costs, exceeds \$3000.00. (Petition, Tr. R., p. 2). (Ans., Tr. R., p. 9-21).

Jurisdiction in the trial court was invoked by reason of the amount in controversy and the diversity of citizenship existing between plaintiff and defendant (28 U. S. C. A., Sec. 41) (1).

The jurisdiction of this Court to review the action of the trial court is based upon appeal from said trial court. (Notice of Appeal, Tr. R., p. 95; Rules of Civil Procedure, 8 U. S. C. A., Rule 73.)

## STATEMENT OF THE CASE

This appeal involves a suit in equity for an accounting brought by Lester W. Hurley, plaintiff below, and appellant here, against the Southern California Edison Company, Limited, defendant below, appellee here, for dividends and stock rights which accrued and were set aside or payment on stock of defendant company owned by the plaintiff, which dividends and stock rights were paid and delivered to Elizabeth J. Price, grandmother of the plaintiff, who was also a stockholder in the defendant company.

The plaintiff alleged in his complaint that the stock, which is composed of two blocks, one for 575 shares of common, and another for 88 shares of common and 191 shares of preferred, was transferred to the plaintiff on November 20, 1928 (Tr. R., p. 3), without his knowledge; that plaintiff first learned of his ownership of said stock on March 18, 1944 (Tr. R., p. 7). That all payment of dividends and delivery of stock rights to Elizabeth J. Price were unauthorized; that all purported assignments and all dividend orders were void or forgeries (Tr. R., p. 8); that plaintiff promptly, upon discovery of said fraud and forgery, disaffirmed said dividend orders and forged assignments (Tr. R., p. 5); that at the time said forgeries occurred, and said dividend orders were executed, plaintiff was a minor 20 years of age (Tr. R., p. 5). That following the establishment by final judgment in the United States District Court in the District of Kansas, of plaintiff's ownership in said stock, this suit for accounting was filed in United States District Court for the Southern District of California, Central Division.

Defendant filed its answer, and alleged "that as a result of the transfer on its books of the said stock described in paragraph 4 of the complaint, and as a result of Dividend Order dated November 19, 1928, relative to the dividends and stock rights on the stock described in paragraph 5 of the complaint, it paid and delivered the said dividends and stock rights to Elizabeth J. Price" (Tr. R., p. 21).

Defendant further pleaded "that defendant denies that said dividends and stock rights, or either of them, were or are owing to plaintiff" (Tr. R., p. 22).

Defendant also filed a supplemental answer (Tr. R., p. 31), but in no manner pleaded or alleged as a defense to this action that payment was made to Elizabeth J. Price, or that said stock rights were delivered to Elizabeth J.

Price as a joint tenant of the plaintiff, and that in consequence thereof, defendant had paid and discharged its obligation to plaintiff under the provisions of Section 1475 of the Civil Code of the State of California.

On these pleadings the case was originally tried in November, 1946, and judgment entered in favor of the plaintiff on October 15, 1947, in Book 46, page 367, for amount of \$10,613.79.

Thereafter, and on the 30th day of April, 1948, the trial court entered its order "that defendant's motion for a new trial be and is hereby granted on the single issue as to whether or not defendant knew or had reason to know of the fraud perpetuated upon plaintiff by plaintiff's cotenant, Elizabeth J. Price" (Tr. R., p. 34).

Thereafter, said new trial was had on November 3, 1948, and findings of fact and conclusions of law were again entered in substantial conformity to the original findings of fact and conclusions of law, save and except that Conclusions of Law XI (Tr. R., p. 62) was inserted. The court then, on the basis of the applicability of Section 1475 of the Civil Code of the State of California, entered judgment for the defendant (Tr. R., p. 94).

In Conclusion of Law XII (Tr. R., p. 63) the trial court found the law to be that "If Section 1475 of the California Civil Code were not applicable to this case," the plaintiff would be entitled to judgment as originally entered, and as set out in said Conclusion of Law XII.

The issue therefore before the Court is (1) whether or not Section 1475 of the Civil Code of California was properly before the court at any time since Section 1475 was not pleaded as a defense and (2) did the single issue as to whether or not defendant knew or had reason to know of the fraud perpetrated upon the plaintiff by Elizabeth J. Price, embrace the issue of the applicability of Section 1475 of the Civil Code of California, as a defense, and

(3) disregarding the first two elements, does Section 1475 of the Civil Code of California constitute a defense under the law and the established facts found in the case at bar.

The appellant takes the position that the facts as found, and the declarations of law made, are true and correct, save and except Finding of Fact XXVII (Tr. R., p. 57), and the Conclusions of Law XI and XII (Tr. R., pp. 62-63), which said Finding of Fact and Conclusions of Law are specified as error.

Briefly enumerated and condensed, the established and undisputed facts are:

(1) That the 575 shares and the 88 and 191 shares of stock were on November 20, 1928, transferred to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants, on the books of defendant company (Tr. R., pp. 36-37).

(2) That without knowledge of the purpose or reasons therefor, and at the request of Elizabeth J. Price, plaintiff did sign gratuitously in blank two dividend orders (Finding V, Tr. R., p. 37).

(3) That Dividend Order No. 12743 directed that dividends on the 88 shares and the 191 shares be paid to Elizabeth J. Price (Tr. R., p. 39).

(4) That William Price died in Los Angeles on January 5, 1929, and was returned to Kansas City, Missouri, for burial (Finding VIII, Tr. R., p. 40). That on or about January 19, 1929, Elizabeth J. Price caused assignments for the 575 shares to be sent by the Brotherhood State Bank, of Kansas City, Kansas, to defendant company in Los Angeles, which assignments purported to bear the signatures of Elizabeth J. Price, George E. Burton, and Lester W. Hurley, and purporting to assign to Elizabeth J. Price and George E. Burton said stock. That said as-

signments were returned to the Brotherhood State Bank on January 22, with the request that the *signatures* be guaranteed. That on February 1, said assignments were received in Los Angeles with the signatures of Price and Burton guaranteed, but without a guarantee of the signature of plaintiff. That on February 7, 1929, said assignments were *again* returned to the Brotherhood State Bank with the statement: "We have your letter of the 29th, and are returning *again* the assignments on which we *asked* that you have the signature (not signatures) guaranteed." On February 19, said assignments were returned to defendant company with the transferee designation and the signature of Lester W. Hurley guaranteed, and transfer was then made on the books of defendant company, after which time defendant company failed and refused to recognize that plaintiff had any interest in or control over said stock, either as a joint tenant or otherwise, and dividends and stock rights were thereafter paid to Elizabeth J. Price, to the exclusion of the plaintiff, and not to Elizabeth J. Price, as a joint tenant of plaintiff Hurley (Finding IX, X, Tr. R., pp. 41-42, Pre-trial Stipulation, p. 26).

(5) That all dividends and stock rights listed in Finding XI (Tr. R., p 43) were paid to Elizabeth J. Price under Dividend Order No. 13157 (Tr. R., p. 45). That all dividends set aside and paid to Elizabeth J. Price were paid without notice, knowledge or consent of the plaintiff, although during all of said time plaintiff was the owner of an undivided one-third interest, and entitled to receive one third of all dividends and stock rights (Finding XIII, Tr. R., p. 45).

(6) That on November 20, 1928, plaintiff was a minor; that the existence of said stock, assignments, and dividend orders, and the use to be made thereof, was concealed by Elizabeth J. Price and George E. Burton from the plaintiff, and plaintiff was in complete ignorance of

all of said transactions until after the death of his grandmother, Elizabeth J. Price, on December 27, 1943 (Finding XIV, Tr. R., pp. 45-46-47).

(7) That on March 18, 1944, plaintiff learned for the first time of the fraud, deceit and forgery that had been practiced on him, and he promptly disaffirmed all of said transfers and dividend orders purporting to have been executed by him. Thereafter, suit was filed in the United States District Court of Kansas, and the forgeries of said assignments were established, and judgment entered sustaining plaintiff's ownership in said stock, which judgment became and was final before this action was brought (Finding XVI, XVII, Tr. R., pp. 49-50).

(8) That on October 15, 1945, demand was made on defendant company for the payment of one-third of all dividends and stock rights, but no payment was made (Finding XVIII, Tr. R., p. 50).

(9) That although the 191 shares and 88 shares were at all times recorded on defendant's books, in the name of the plaintiff as joint tenant, and his address recorded, all dividends and stock rights on said shares were paid to Elizabeth J. Price from and after December 11, 1928 (Tr. R., pp. 51-52-53).

(10) That at the time Dividend Orders No. 12742 and 12743 were signed, plaintiff was a minor, and received no consideration for the execution of said orders, and the nature and purpose for which they were used was concealed from him. That plaintiff's disaffirmance of all assignments and dividend orders were made, under the circumstances, in a reasonable time after reaching his majority (Finding XXVI, Tr. R., p. 56).

(11) That under date of January 25, 1929, and thereafter, resolutions were adopted by the defendant com-

pany, which provided that warrants representing stockholders rights to subscribe for and purchase additional shares, be issued in the name of the stockholder and mailed or delivered on or before April 22, 1929, March 25, 1930, and March 25, 1931, together with a letter setting forth the basis and condition on which the right to subscribe may be exercised; that all of said warrants be assignable by indorsement of said warrants (Finding XXVIII, Tr. R., p. 57-58). In disregard, however, of said resolutions, no warrants and no letter or letters were mailed or delivered to the plaintiff. Further, plaintiff indorsed no warrants transferring plaintiff's stock rights. However, defendant company ignored said resolutions and paid all dividends, and delivered all stock rights to Elizabeth J. Price, to the exclusion of the plaintiff (Tr. R., pp. 26, 27, 28).

The appellant takes the position that on the basis of the facts found that the Conclusions of Law XI and XII are erroneous; that under the law, Sec. 1475, Civil Code of California, constitutes no defense; that this appeal has been duly taken from and specifically limited to said erroneous conclusions of law on which said judgment (Tr. R., p. 94) was entered.

**SPECIFICATIONS OF ERRORS TO BE ARGUED.****I.**

The court erred in its Conclusion of Law XI (Tr. R., p. 62), "that pursuant to the provisions of Section 1475 of the Civil Code of the State of California, defendant discharged its obligations to the plaintiff herein as an owner in joint tenancy of stock in defendant corporation by its payment of dividends to, and delivery of stock rights to, or upon the order of Elizabeth J. Price, joint tenant and obligee," for the reason that payment to one of several joint tenants has not been so pleaded by defendant as to raise the issue, but defendant has so pleaded as to preclude reliance on Sec. 1475, Civ. Code of California, as a defense.

**II.**

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of the fraud practiced on the plaintiff as a co-tenant, and this eliminates Section 1475 of the Civil Code of California as a defense.

**III.**

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that the law is well settled that when a dividend is declared and set aside it is immediately severed from the stock, and title thereto vests in each stockholder individually, and not as a joint tenant, regardless of how the stock may have been held, and thus Section 1475, Civil Code of California, can have no application to dividends declared and set aside for payment.

## IV.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, because defendant knew, or had reason to know, of the forgery and fraud perpetrated upon the plaintiff by Elizabeth J. Price and George E. Burton, through notice, both actual and constructive, by receipt of the forged assignments and invalid dividend orders on the basis of which plaintiff was excluded from all payments, thus eliminating Sec. 1475, Civil Code of California, as a defense.

## V.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant had actual knowledge as a matter of fact and law that defendant Hurley was being "*excluded*" from the dividends and stock rights, and this exclusion is the "fraud" that is referred to in the exception read into Section 1475 by the decisions.

## VI.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) "that neither said dividends or stock rights constituted *deposits* in the hands of the defendant, and are herefore not controlled by the provisions of the California Civil Code relating to deposits," for the reason that said dividends, set aside, constituted a deposit with defendant and the exception; expressly stated in Section 1475 as to deposits, precludes reliance on the section in the case at bar.

## VII.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that as to the divi-

dends on the 88 shares of common stock and the 191 shares of preferred stock, defendant not only knew or had reason to know that plaintiff was being excluded from said dividends and stock rights, but the defendant actually issued and delivered the warrants representing said stock rights to Elizabeth J. Price and failed to disclose, in violation of its own resolution, information concerning said dividends and said warrants which fraud and secretion eliminated Section 1475 of the Civil Code as a defense.

### VIII.

That the trial court erred in its Conclusion of Law XII (Tr. R., p. 63) that plaintiff was not entitled to interest on dividends wrongfully paid to Elizabeth J. Price prior to the date of demand for said payment. Since a prior demand would have been a vain and useless act, such demand under the law was waived and appellant is entitled to interest on each dividend from the date said dividend was declared and set aside for payment.

### IX.

That the trial court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant was bound to know that plaintiff was a minor, and Sec. 33, Civ. Code of California, precludes Sec. 1475, Civ. Code, from applying to minors.

## ARGUMENT.

### I.

The trial court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant failed to so plead payment to one of several joint tenants as to raise said issue but has so pleaded as to preclude reliance on such payment as a defense under Sec. 1475 Civ. Code of California.

At the outset we desire to direct the Court's attention to the fact that appellant, plaintiff below, was and is entitled to have this cause of action determined on the basis of the allegations of the plaintiff's complaint and the defenses pleaded by the defendant company. We take the position that it is not incumbent on the appellant to establish the fact that some defense not pleaded would not constitute a defense, even had it been properly and timely presented for determination.

Before the defense, now relied on by the defendant, that the defendant discharged its obligation to the plaintiff by payment of the dividends and delivery of the stock rights to Elizabeth J. Price as a joint tenant can properly be considered as a defense by this Court, the defendant is obligated to show that such defense was properly pleaded, as well as the existence of all those elements essential to establish its applicability to the fund involved in this suit.

Now, however carefully the defendant's answer, together with defendant's supplemental answer, may be searched, no allegation will be found therein that alleges or purports to allege that the fund (dividends and stock rights) here in suit was owned or held by joint tenants, and that in performance or discharge of the defendant's obligation to pay said dividends and deliver said stock rights, that it did so pay said dividends and deliver said stock rights to one of said joint tenants, without knowl-

edge or notice that plaintiff was being excluded from participation or benefit therein.

On the contrary, the entire defense brought forward by the defendant was predicated, first, on the legality and genuineness of the forged transfers of the stock certificates, as a result of which forged assignments, said stock was transferred by the defendant upon the books of the company, thus eliminating plaintiff's entire interest in said stock either as joint tenant or otherwise (Tr. R., p. 21) and second, on the validity and genuineness of Dividend Orders No. 12743 and 13157, by the terms of which, payment to Elizabeth J. Price as an individual and not as a joint tenant of the plaintiff was authorized (Tr. R., pp. 26-27). Further in this connection it will be noted that nothing is alleged to be contained in these dividend orders that in any manner authorized the delivery of stock rights owned by plaintiff to Elizabeth J. Price.

In other words the defense alleged was that a valid transfer of all interest belonging to the plaintiff had been made to Elizabeth J. Price, and that plaintiff no longer had any interest in or connection with the dividends in question, personally, as joint tenant, or otherwise; that "said dividend payments were made and said stock rights delivered upon the authority of, and in pursuance of Dividend Order No. 12743, dated November 22, 1928" (Tr. R., p. 27). (Ans., pars. 12-13, Tr. R., p. 21-22.) (Pre-trial Stip., par. 4, Tr. R., p. 26.)

Defendant alleges in paragraph 13 of its answer: "That defendant denies that said dividends and stock rights, or either of them, were or are owing to the plaintiff." It is evident that this allegation could not be true if the defendant considered that plaintiff was a joint tenant and a joint obligee during any of the time that said dividends had been declared and set aside for payment, or said stock rights authorized. Except for the assignments and divi-

dend orders, said dividends and said stock rights were owing to the plaintiff to the same extent, and in the same manner, as they were owing to Elizabeth J. Price.

It is held in *Stark v. Coker*, 20 Cal. (2d) 839, l. c. 844, that "one of the characteristics of joint tenancy is equality of the interest held by the respective tenants (Civ. Code, Sec. 683)." If, therefore, the dividends were not owing to the plaintiff, they were not owing to Elizabeth J. Price, or George E. Burton, and the absurdity would be reached that they would not be owing to anybody.

Not only was it found by the court that the dividends and stock rights were paid and delivered to Elizabeth J. Price, pursuant to assignments and dividend orders, as pleaded by the defendant (Finding XII, Tr. R., p. 45), but in plaintiff's Exhibit 31 the written admission by defendant appears that:

"In each of the years 1929-1931, inclusive, it also issued to her (Elizabeth J. Price) 575 shares of common stock rights. \* \* \* In each of the years 1929-1931 it issued to her 88 shares of common stock rights."

Thus it appears that the defendant not only pleaded payment and delivery of dividends and stock rights to Elizabeth J. Price, but that even the stock rights, which were represented by warrants, were *issued* to Elizabeth J. Price, not as a joint tenant of the plaintiff, but to the exclusion of the plaintiff, and in direct violation of resolutions passed by the Board of Directors of the defendant (Finding of Fact XXVIII, Tr. R., p. 57).

It follows that the defendant not only failed in the defense pleaded and relied on, but has so pleaded as to preclude the defense on which it now attempts to rely, which defense we will hereafter show likewise constitutes no defense.

The situation here presented is one where defendant pleads and attempts to prove a defense based on the premise that the plaintiff has no interest or ownership in the dividends in suit of any kind or character whatsoever, and then when this defense is ruled against it, it seeks to rely on a defense based on the premise that the plaintiff did have an interest and ownership in the dividends and stock rights of a special and particular kind, namely, that of joint tenant.

The fundamental basis, therefore, of the defense on which the defendant now seeks to rely is in direct repudiation and contradiction of the state of facts which defendant pleaded and attempted to prove. The defendant is in the position of denying plaintiff's interest and ownership, due to alleged assignments (Defendant's Ans., pars. 12-13, Tr. R., pp. 21-22), and now confessing said interest and ownership, and seeking to avoid it. This cannot be done.

49 C. J. 293 states the rule:

“A plea in confession and avoidance, or an answer setting up new matter which should set forth such further facts as, if true, would defeat plaintiff's right to recovery. A plea which confesses, but which does not set up matter in avoidance is bad.”

In this connection it must be borne in mind that the defendant has in no manner pleaded the facts relied upon as an avoidance of its obligation to the plaintiff. While payment to Elizabeth J. Price is still relied upon, such payment is not now relied upon as having been made to Elizabeth J. Price as the assignee of plaintiff, as in defendant's answer alleged, but on the contrary defendant now takes the position that plaintiff's interest was not assigned, or his ownership transferred, but that defend-

ant at all times dealt with the dividends and stock rights as a fund in which the plaintiff retained his interest and ownership as a joint tenant.

21 R. C. L., Section 129, p. 117, states the law to be:

“A plea of payment must allege the facts on which it is based, and if it does not do so, it will be held bad on demurrer.”

*Hancock v. Yarden*, 120 Ind. 366, 23 N. E. 253.

Pleading a defense requires the allegation of the facts as to what was done by the defendant, which is relied upon as a defense to plaintiff's cause of action. When such facts are alleged, it is universally held that they are binding on the defendant, and cannot be blandly repudiated and disregarded at a later date as may seem advantageous or convenient.

49 C. J. 122, Sec. 121, states this rule as follows:

“The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader \* \* \*. It follows that a party cannot subsequently take a position contradictory of or inconsistent with his pleadings, and the facts admitted by the pleadings, are taken to be true for the purpose of the action.”

Again in 21 C. J. 482, Sec. 564, it is stated:

“Plaintiff is entitled to the benefit of all the admissions made in the answer. Where a fact is alleged in the bill and admitted in the answer the admission is conclusive. The facts admitted are not in issue, and so need not be proved, nor can they be called in question or disproved.” *Pugh v. Fairmount Gold, etc., Min. Co.*, 112 U. S. 238, 5 S. Ct. 131, 28 L. Ed. 684.

Now, when we attempt to apply the present position of the plaintiff to the facts, we are immediately brought into violent conflict with the facts that stand established in this case. If it can be assumed, which we deny, that such payment was made to Elizabeth J. Price, as a joint tenant, this position of necessity, embraces and includes as a part thereof recognition by the defendant of the plaintiff at all times as a joint tenant in the fund in suit. The established facts show, however, the plaintiff's name was removed from the books of the company as a joint tenant of the 575 shares of stock (Finding IX, Tr. R., pp. 41-42), and Dividend Order No. 12743 was filed and acted upon, and stock rights issued, not to the plaintiff, but to Elizabeth J. Price (Finding XIX, Tr. R., pp. 51-52-53).

Thus, not only does it appear that the position of the defendant now taken is contradictory of the defense pleaded, but the facts as found are contradictory of the defense now relied upon by the defendant.

We assert that the position of the defendant may be illustrated by taking a typical joint tenant situation. Assuming that A owes a note to B and C jointly. A decides to pay the note and he says to B: I am going to pay this note to you, to the exclusion of C, as it appears that C has assigned his interest in this note to you anyway. A pays the entire note to B. Then C sues A, and A answers that he did pay the note to B as the entire owner, with no intention that C should in anywise benefit from said payment. A further pleads that B has an assignment from C, legally conveying C's interest to B, and that C does not own, and did not own, at the time payment was made, any interest in the note of any kind or character.

The case is tried, and it is established that B does not have a valid assignment from C, and all defenses pleaded fail, and judgment is entered for C. After this occurs, A takes the position that although he did plead that he made

the payment to B individually, and in disregard of, and to the exclusion of C, he now claims the facts to be that he made payment to B, not in disregard of, or to the exclusion of C, but that he paid B as a joint tenant of C.

Can anyone say that such a situation does not embrace the repudiation and contradiction of what A did by asserting different action, for the purpose of changing the legal effect of the action previously alleged and admitted? We assert that in such a case, A would stand committed by his pleadings, and would not, and should not, be later heard to say that payment was made to B for a different purpose, and in a different capacity, than that in which it was alleged, pleaded and admitted.

The defendant is precluded and estopped from relying on the defense of payment to one of two joint tenants, since it pleaded in its answer and admitted that payment was made to Elizabeth J. Price, to the exclusion of the plaintiff, and such payment was intended to be so made. The nature of the payment and the party to whom made was fixed at the time it was made.

The same principle applies to an obligor that direct application of the payment to one debt, and then later decides that it is more desirable to have application made to a different debt. The obligor is bound, and cannot exonerate himself, by then attempting to switch the application to a different debt. This rule is stated in 21 R. C. L., Sec. 94, page 90, that:

“When one of the debts or items of account is illegal, and the other valid, the debtor may, at his option, apply a debt to either. In such case, an appropriation upon the illegal claim is as valid and binding on the debtor as if it were legal, and he cannot subsequently, without the creditor’s consent, change it and have it applied to the legal demand.”

## II.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of fraud practiced on plaintiff by his co-tenant and this eliminates Sec. 1475, Civ. Code of California, as a defense.

In considering further defendant's reversal of position as to whom payment was made, the question immediately arises as to when defendant first decided and determined that it was making payment of the fund in question to Elizabeth J. Price as a joint tenant of the plaintiff.

The Court will note that by the finding made by the court in this cause, it is found that a transfer of plaintiff's interest in the 575 shares of stock was made on the company's books on February 19, 1929 (Finding of Fact IX, Tr. R., p. 42), and Dividend Order No. 13157 (on which plaintiff's name did not appear), and Dividend Order No. 12743 was received by the defendant on December 11, 1928 (Finding X, Tr. R., p. 42, and Finding VII, Tr. R., p. 39).

The first payment made to Elizabeth J. Price on the fund in suit on Dividend Order No. 13157 was made after date of said order, namely, March 18, 1929 (Finding XII, Tr. R., p. 45, Finding XX, Tr. R., p. 53).

It therefore clearly appears that every dollar paid to Elizabeth J. Price involved in this suit was made after the dividend orders and assignments were received, held by defendant to be valid, and transfer made to Elizabeth J. Price and George E. Burton on the books of the defendant company.

In this connection it must be remembered that the defendant company had duties to perform that were binding on it when these dividend orders and assignments

were received. It could not throw them in the file and say: "We are not going to bother with these dividend orders or assignments, or decide anything about them. We don't care whether they are valid or invalid. The stock is held in joint tenancy and that is enough for us."

The defendant was bound to act at its peril to exercise due diligence in protecting the interests of its stockholder.

The case of *Tafft v. Presidio R. R. Co.*, 84 Calif. 131, 24 Pac. 436, declares the law to be:

"The bank or other corporation, and also defendants, are trustees to a certain extent to the stockholders—that is for the protection of the individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation."

Again, in the case of *Cooper v. Spring Valley Water*, 171 Calif. 158, 153 Pac. 936, the court said:

"The company with respect to its capital stock issued and delivered to third persons, and with respect to conflicting claims of different persons to the same stock, and the right to each to have a transfer thereof, occupied a fiduciary relation to both. Its action in transferring the stock would operate to clothe the transferee with apparent legal title to the stock. It was therefore bound to exercise good faith in its determination of the matter."

It is evident that when said assignments and dividend orders were received, the defendant company was duty-bound to decide how they would be treated. If they were valid, the joint tenancy between Elizabeth J. Price and the plaintiff Lester Hurley was ended. To end this joint

tenancy and convey the interest of Hurley was the manifest object and purpose of the instruments. If the company accepted them and acted on them as valid assignments, it would be compelled to proceed on the basis that the plaintiff had no further interest in said dividends and stock rights, and the joint tenancy was ended accordingly. Payment thereafter would have to be made to Elizabeth J. Price as the legal successor and assignee of the plaintiff's interest.

In other words, the defendant either recognized the plaintiff as a joint tenant, after the receipt of said assignments and dividend orders and disregarded the assignments and dividend orders as invalid, or it accepted the dividend orders as valid and thereafter refused to recognize the plaintiff as a joint tenant. How could it do both?

If, on the other hand, it paid Elizabeth J. Price as a joint tenant of plaintiff (as now asserted), it could only do so on the basis that plaintiff's interest and ownership had *not* ended, but was still recognized by the company. The only basis on which the plaintiff's interest as a joint tenant could have continued would be on the basis that the assignments and dividend orders were invalid and were so considered by the defendant.

Consequently, defendant had to disregard the assignments and treat them as invalid if it did what it asserts, namely, made payment to Elizabeth J. Price as a joint tenant of the plaintiff, Lester W. Hurley. This, of necessity convicts the defendant of knowledge that the assignments and dividend orders were illegal and fraudulent, and known to be so by the defendant, to justify such action on the part of the defendant. If it considered the assignments valid, it would have had no reason to make any payment to Elizabeth J. Price as a joint tenant of plaintiff.

We submit, therefore, that if the defendant company paid Elizabeth J. Price as a joint tenant, after having decided (as it must have done) in order to make payment to Elizabeth J. Price as a joint tenant that the assignment and dividend orders furnished by Elizabeth J. Price were illegal and invalid, it would be paying a joint tenant with the knowledge of the fraud Elizabeth J. Price was attempting to perpetrate on her co-tenant, Lester W. Hurley, through said fraudulent assignments, and defendant for this reason alone would not be exonerated by such payment, and Sec. 1475, Civ. Code of Calif., could in no manner constitute a defense. Restatement of Contract, Sec. 131 (2).

### III.

**The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that when a dividend is declared and set aside, it is immediately severed from the stock and title thereto vests in each stockholder individually, and Sec. 1475, Civ. Code, can have no application.**

We earnestly direct the Court's attention to the fact that the fund involved in this case is not just a fund derived from personal property charged to be held in joint tenancy. The fund (dividends) involved herein falls in a special class and is therefore subject to the special rules, limitations and controls fixed by the law relative to dividends only. The funds out of which dividends can be paid, the time when dividends vest in stockholder, the distinction between dividends and earnings, as well as distinction between dividends and the aggregate corporate property are determined and controlled, not by the general law relative to income from personal property, but by the law applicable to corporate dividends alone.

It follows that the law dealing with dividends and their ownership constitutes the law to which we must look to determine the nature of the title or ownership of the parties interested in the fund involved in this suit. The fundamental question arises, therefore, whether or not the dividends claimed by the plaintiff constitute a fund which was held or owned by the plaintiff jointly with Elizabeth J. Price and George E. Burton, so as to make the payment of said fund to one a discharge of the obligation to all.

This question cannot be answered by assuming, as has been done in this case, that funds in the form of dividends derived from stock held in joint tenancy, although declared and set aside, as a matter of course constitute a fund, likewise held in joint tenancy (as joint creditors) and consequently, Section 1475 of the California Civil Code applies.

As pointed out above, it is not properly the burden of the plaintiff to establish that the California Civil Code, Section 1475, does not apply, but it is the primary burden of the defendant to plead and prove that it does apply, as this was the defense upon which the defendant in finality relied. To support this burden it is imperatively necessary for the defendant to establish under the law that dividends declared and set aside by the defendant on stock held in joint tenancy, constitutes a fund owed to joint tenants as *creditors*. Further, that the payment of said fund was made in good faith to Elizabeth J. Price and not with callous disregard of plaintiff's rights as a co-obligee (if he was a co-obligee); that said payment was made for the benefit of all co-obligees, and not Elizabeth J. Price alone, as alleged in defendant's answer and as admitted by defendant in pretrial stipulation (Tr. R., pp. 26-27-28).

The law is well established that joint tenancies are looked upon with disfavor under the law, and it cannot be assumed that when stock is held in joint tenancy that the law has established that the scope of joint tenancy is such that it reaches out and impresses upon or imparts to the dividends derived from such stock, the joint tenancy and joint creditors status, in the dividends so declared. Both the logic and the rulings on the point are all to the contrary and fail to support the theory that when stock is held in joint tenancy this form of holding follows the dividends when declared and set aside and imparts to such dividends the same form of holding or ownership as that by which the stock itself is held.

It has been repeatedly held that dividends do not even follow the ownership of the stock itself after they have been declared and set aside for payment. To get clearly before the Court the line of demarkation that has been laid down by the law as between stock and dividends, let us assume that A owns stock in a corporation; that a dividend is declared and set aside for payment on December 8, 1948, payable December 20, 1948. A assigns his stock to B, December 9, 1948. B gets the stock, but the dividends so declared remain the property of A. This is true although B is the unquestioned owner of the stock when the dividend is paid and is therefore entitled to full possession and control of said stock.

In the case of *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347, the plaintiff was the owner of shares of stock in a corporation which he sold to Chapman and Goss. At the time the stock was sold a dividend had been declared thereon, viz., March 1, 1886, payable May 1 and July 1, 1886. The defendant paid the dividend to Chapman and Goss and thereafter plaintiff brought his suit to recover the dividend. The court said:

“By the declaration of a dividend, however, the earnings to the extent declared are separated from the general mass of the property and appropriated to the then stockholders who become creditors of the corporation for the amount of the dividend. \* \* \* The earnings represented by the dividend, although the fruit of the general property of the company are no longer represented by the stock but become a debt of the company to the individual who at the time of the declaration of the dividend was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of the dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be passed with the stock by special agreement but not otherwise. The dividend would pass as an incident of the stock \* \* \* the dividends are earnings growing out of the stock, but when declared are immediately separated from it and exist independently of it. They are happily likened in the case last cited to fallen fruit, which does not pass with the sale or gift of the tree. \* \* \* Judgment for plaintiff.”

*McLaren v. Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819, l. c. 822, involved a suit by the plaintiff to compel the defendant to pay a dividend which defendant company, after passing a resolution declaring the same sought to rescind and nullify. The court held:

“From these considerations we are persuaded that the mere declaration of the dividend itself, without the setting aside of the fund creates a debt and that when the learned text-writers, *supra*, employ the terms ‘set aside,’ ‘set apart,’ and ‘actually set apart,’ as above pointed out, they proceed upon the theory and principle, *supra*, that the act of declaring a dividend, operating as it does, as an actual *severance* of the *dividend from the stock* and corpus of the corpo-

rate property and estate, is *ipso facto*, in and of itself, the setting apart, setting aside, and segregating such dividend in the sense that it creates an immediate right of the stockholder to demand and recover the same when due, inasmuch as *thereby it is actually severed* and segregated from the other property.”

On this point the court said:

“Wherefore it appears that the principle obtains that the mere declaration of the dividend, without more, by competent authority under proper circumstances, creates a debt against the corporation in favor of the stockholder the same as any other general creditor of the concern; whereas, *the setting apart of a fund after or concurrent* with the declaration, out of which the debt thus created is to be paid, passes one step further toward securing the payment of the *identical fund* to the shareholder inasmuch as the law treats the setting apart of such fund as a payment to the *corporation as a trustee* for the use of the stockholder, on which fund the stockholder has a lien, and to which fund he has rights superior to the general creditor \* \* \* the doctrine is that by the mere declaration, the dividend becomes immediately thereby *separated and segregated from the stock and exists independently of it*; that the right thereto becomes at once immediately fixed and absolute in the stockholder, and from thenceforth the right of *each individual stockholder is changed by the act of declaration* from that of partner and part owner of the corporate property to a status absolutely adverse to every other stockholder and to the corporation itself, insofar as his *pro rata proportion to the dividend is concerned.*” (Citing many cases.) (Emphasis ours.)

The rule was laid down in *Smith v. Taecker*, 133 California App. 351, 352, 24 Pac. (2d) 182, where the court said:

“Upon the declaration of a dividend by the Board of Directors of a corporation, the share of each stock-

holder, *vests* in him as *an individual*. (Citing cases.) It makes no difference when the assets were accumulated. 14 C. J. 818. It is universally held that a mere declaration of a dividend creates a debt against a corporation in favor of the stockholders, *as individuals*." (Emphasis ours.)

It will be noted that in the case of *Smith v. Taecker*, *supra*, that the court specifically holds that when a dividend is declared, the share *vests* in him *as an individual*. This language cannot be construed to mean that when a dividend is declared it vests in each stockholder his share in the dividend in the manner and form in which said stock was held on which said dividend was declared. When debts are created in favor of stockholders as *individuals* it is difficult to understand how their individual holdings can be turned into a joint tenancy automatically and without any action on the part of the individuals involved. As above indicated, the plaintiff who was the owner of the stock on the day the dividends were declared was held to be entitled to the dividends and not the subsequent transferee of the shares.

In the case of *Jerome v. Cogswell*, 204 U. S. 1, l. c. 7, 8, the court said:

"The right to receive what might ultimately be realized from the fund set apart became therefore irrevocably vested in those who were shareholders on June 9th, 1900, and their assigns are now entitled to whatever is to be distributed from it."

Again, let us assume that A owns stock. A dividend is declared and set aside December 8, 1948, payable December 20, 1948. A, by specific bequest, wills said stock to B. A dies December 9, 1948. B, under the will, gets the stock,

but the dividends go to the residuary estate of A, and B has no title or interest in said dividends.

*De Gendre v. Kent, L. R.*, 4 Eq. 283 (1867), was a case in which a dividend was declared upon certain shares of stock held by testatrix and declared payable on July 15, 1865, and Jan. 15, 1866. Testatrix died on the 31st day of December, 1865. The court held:

“As soon as the dividend was declared, although payment, for convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee and she specifically bequeathed it. I cannot distinguish it from the case of a bill of exchange at six months given by the company, upon which, although payment, for the convenience of the company, is postponed, a present claim would arise. This dividend, therefore, which was earned in the lifetime of the testatrix, though declared payable at a future time, was a debt due to her at the time of her death, and formed part of the corpus of her estate. She has given the tree to the plaintiff, but as to this particular fruit it seems to have fallen during her (testatrix) lifetime.”

In the case of *Brundage v. Brundate*, 60 N. Y. 544, the will of B bequeathed to S 10 shares of stock in N. Y. C. R. R. Co. The company, after the execution of the will and before testator's death, issued to its stockholders what were styled “interest certificates.” In an action by the legatees to compel delivery of said interest certificates in connection with the stock certificates, it was held that the

“legatee took the specific number of shares of stock as they were at the time of the testator's death and could claim no right to, or interest in, the certificates.”

The court further held:

“And where he has bequeathed shares of capital stock, as such, no dividends thereon declared and received by him in his lifetime passed to the legatee of the stock, as attached or accessory thereto. If the testator in this case had made just the bequest he did make of these shares of capital stock, and had also, in expressed terms, made bequest to a different legatee of these certificates, can there be any doubt but that if they are valid instruments, they would have passed to that legatee?”

In the case of *Sanitarium v. McCune*, 112 Mo. Apps. 332, l. c. 336, 87 S. W. 93, the court declares the law to be:

“The general rule stated in the briefest way is that a dividend belongs to the one who is the owner of the stock at the time when the dividend is actually declared, irrespective of the time when it is earned, although it may be made payable at a future date (citing many cases). \* \* \* Indeed the law is well settled to the effect that he who owns stock at the time the dividends are declared, owns also the dividends and it is immaterial when the dividends accrued, whether before or after the death of the testator, as the time the law fixes in adjusting the ownership of the dividends is the time when the dividends were declared and thus severed from the stock of which theretofore they are treated as incident and if there was in this case a bequest of the bank stock, there would be no difficulty in agreeing with appellant in its contention.” (Emphasis ours.)

*In the matter of Kernochan*, 104 N. Y. 618, 11 N. E. 149. In this case by the will of N, a trust fund was created by the terms of which the executors of said trust estate were authorized “to receive the rents, interest, and income,” for the use of testator’s widow during her life-

time, remainder to beneficiaries named. The trust included certain shares of stock on which stock on April 14, 1881, a dividend of \$25,000 was declared, payable May 2, 1881. The testator died the night of April 20, 1881.

Held:

“That as soon as the dividend was declared the owner of the shares is entitled to it, and it became a part of his estate; and that the dividends to which the life tenant was entitled as income were only those declared after the testator’s death.”

Thus we see that whether by will or conveyance the dividends when once declared and “set aside” are not carried over to the new owner of the stock. The dividends remain as a part of the *personal property* of the owner of the stock at the time the dividend is declared. Further, when the dividend is not only declared but “set aside” for payment it becomes a *special fund* or *deposit paid to the corporation* and held by the corporation for the stockholders. The stockholder is entitled to “payment of the identical fund.” *McLaren v. Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

The reason for the course dividends take is clear. A *severance* occurs between the stock and the dividends the moment the dividend is declared and the dividend immediately and instantly *vests* irrevocably in the *individual* stockholder and exists *thereafter separate and apart from the stock*. It cannot be carried forward by a sale or bequest of the stock because it is no longer a part of the stock, has no relation to it, and is in no manner connected with it.

If the dividend exists separate and apart from the stock so that it cannot even be conveyed or assigned by the sale of the stock itself or by will of the stock itself,

by what reason can it be said that it is any longer controlled or affected by the form of ownership of the stock from which it has been *severed*, separated and segregated? The form of ownership in which the stock is held could have no more effect upon the form of ownership of the dividends when *once declared and set aside* than could the joint ownership of one piece of property held by A and B control or affect the form of ownership of another and separate piece of property owned by A and B as partners or as individuals.

Now, let us further assume A, B and C own stock in joint tenancy. A dividend is declared and set aside on December 8, 1948, payable December 20, 1948. C dies December 9, 1948. The stock goes by right of survivorship to A and B, but the one-third share of the dividends does not pass by survivorship to A and B but goes to the heirs or *legatees of C*.

The case of *Walmsley v. Foxhall*, 40 L. J. Chancery, 28, reported in Law Journal, 1871, new series, 40 Equity, is *decisive of the question here involved*. In this case a joint tenancy was created in favor of several parties by the terms of which the income was payable to said parties during their joint lives. The income was accumulated and upon the death of one of said joint tenants the question was raised as to whether *his personal representative* was entitled to his share or whether the whole belonged to the survivors. We quote the short opinion, which is as follows:

“Lord Romily, M. R., Nov. 19, 1870—Joint tenancy—Income—Right of survivors. A joint tenancy in income is severed as to each installment as it becomes payable, without actual payment.

A fund was settled upon trust to pay the income thereof to a number of infants during their joint lives. During their infancies the income for many

years was accumulated. One of them having died, the question was raised whether his personal representative was entitled to a share of the accumulations or whether the whole belonged to the survivors. Mr. Nalder submitted the question that the infants were joint tenants of the income and there had been no severance.

Mr. Cates appeared to support the contrary view but was not heard.

The Master of the Rolls was clearly of opinion that as soon as any part of the income became payable, the joint tenancy in that part was *severed*, and consequently that the personal representative of the deceased was entitled to a share of the accumulations." (Emphasis ours.)

It follows that if the right of survivorship cannot carry the dividend, once declared and set aside, over to the survivor, it is clear that the dividend when once declared is *not held in joint tenancy* but that a *severance* has immediately occurred upon its declaration.

In this connection we call attention to the definition of severance as stated in Black's Law Dictionary, page 1088:

"In estates. The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy but is severed."

Joint tenancy may be broken (severed) and the joint tenancy status destroyed, even by conveyance by one of the joint tenants to a stranger. *Oberwise v. Poulos*, 124 Cal. App. 247, 12 Pac. (2d) 156, l. c. 158.

The frequent and recurrent use of the term *severance* by the courts in declaring that "when the dividends were declared and thus severed from the stock" leaves no doubt as to the meaning of the language and its significance in terminating any further possible claim that a joint tenancy continues to exist therein.

In England, where the rule embodied in Civil Code of California, Section 1475, is recognized, the court nevertheless refused to extend it to apply where a trust or charge was involved. *Matson v. Dennis*, 46 E. Rep. 952 (1864), 4 DE. S. J. and S. 345.

The court said:

“The deed of conveyance was, however, only executed by one of them, and he signed a receipt indorsed on the deed, acknowledging by such receipt the payment of the 3000-L “to us.” The deed was not executed, nor was any receipt signed by Mr. M’Leay, who is not proved to have been dead at the time, nor is he indeed proved to be now dead.

The question is, whether when an equitable charge is vested in two persons—and *as I will assume as joint tenants*—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate.

In my judgment, and in the absence of special circumstances such as are not shown to exist in the present case, *that cannot be done*. The purchaser is entitled to have it taken here, that Mr. M’Leay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity.” (Emphasis ours.)

The case of *Swartzbaugh v. Sampson*, 11 Calif. App. (2d) 451, 54 Pac. (2d) 73, declares four elements must exist for the creation of a joint tenancy, namely:

“Unity of interest, unity of title, unity of time, unity of possession. *But the distinguishing incident is a right of survivorship*. (1 Cruise 359, Sec. 27; 2 Crabb’s Real Property, Sec. 2306). \* \* \* An estate in joint tenancy can be severed by destroying one or

more of the necessary unities, either by operation of law, by death, etc." (Emphasis ours.)

It is evident from all of the cases on the point, both in California and elsewhere, that the "distinguishing incident—right of survivorship"—does not exist as to dividends declared and set aside. This fact alone is decisive as to the applicability of Civ. Code 1475 to the fund involved herein.

All the cases on the question, as well as the logic of the situation, conclusively establishes that while the right of survivorship in stock held in joint tenancy will carry to the survivor, the stock as well as the dividends declared *after* the stock is passed by survivorship, the rule of survivorship can in no manner pass the dividends *declared before*, for the very good reason that when the transfer by survival takes place, the prior declared dividends have been *severed* from the stock and are not a part of the property upon which the right of survivorship operates.

Now, as indicated in the authorities above cited, a dividend has been happily likened to the fallen fruit from a tree. The sale, conveyance or gift of the tree does not carry with it title to or ownership in the fallen fruit. If ownership in the fallen fruit (dividend) by sale, conveyance or gift of the tree (stock) does not pass, then how can the form of ownership by which the tree was held be imported or attached to the fallen fruit (dividend)?

No California case has been found that lays down any different rule than those stated in the cases above cited.

The case of *Fish v. Security-First National Bank*, 31 Calif. (2d) 378, 89 Pac. (2d) 10, has been referred to as holding that dividends from stock held in joint tenancy retain a joint tenancy character. This case does not so hold.

In the *Fish* case, *supra*, no dividends from stock declared and set aside were involved. In May, 1942, 1,000 shares of stock were issued in joint tenancy. In October, 1942, the stock was sold and payment made therefor to one of the joint tenants in her own name. This payment was then loaned back to the company and a note taken therefor. The issue arose between the surviving joint tenant and the personal representative of the deceased, and not between the obligor and the excluded joint tenant.

The question, therefore, in the *Fish* case, *supra*, was whether or not the proceeds derived from the sale of the stock itself and thereafter invested in other property retained its joint tenancy status. The holding that it did could, well be, correct, but this does not touch the question in the case at bar.

The fund here in question is not proceeds from the sale of joint tenancy stock, but dividends declared and set aside on the stock. This is a very different thing. Interest on a note held in joint tenancy is not controlled by the same rules as dividends on stock. It has never been held that the sale by endorsement and delivery of a note would not carry to the purchaser the due and unpaid interest. However, it is well settled that the sale of stock will not carry to the purchaser the declared and unpaid dividends on the stock so sold, endorsed and delivered.

It is apparent that on the sale of the stock the proceeds derived from the sale stand in the place of the stock itself. However this may be, it does not follow that because the proceeds derived from the sale of the stock and reinvested retain the status of the corpus of the property from which the fund was derived, that dividends declared and set aside, and thereby separated, segregated and severed from the stock, so that they do not even follow the ownership of the stock, whether said ownership be obtained by sale, gift

or survivorship, that such fund is impressed with the joint tenancy status.

The cases above cited establish the general rule on the question, with no exceptions stated. Further, *Walmsley v. Foxhall*, *supra*, declares the same rule with respect to joint tenancy.

It further appears from all the cases on the point that when a dividend is not only declared but *set aside* for payment, a trust is immediately created and the corporation is held to have paid the fund to the corporation for the benefit of the individual stockholder. The corporation becomes a trustee or stakeholder of the fund and the relationship of debtor and creditor has ceased and that of trustee and *cestui que trust* established. The *cestui que trust* (stockholder) then has rights therein superior to general creditors.

All that has been said above clearly applies to all cash dividends on the 575 shares as well as the 88 and 191 shares. As to the stock rights, a joint tenancy at no time ever existed in these rights as the ownership therein was fixed by resolution (Finding XXVIII, Tr. R., p. 57) in each stockholder, to be evidenced by warrants transferrable by endorsement only.

We submit that Section 1475, Calif. Civil Code, has no application.

#### IV.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), because the defendant knew or had reason to know of the fraud practiced on plaintiff by receipt of forged assignments and invalid dividend orders which carried notice and knowledge *ab initio* to defendant, and this eliminates Sec. 1475, Civ. Code, as a defense.

It is a well-established principle of law that fraud vitiates everything it touches.

Restatement of Contracts, Sec. 131 (2d), page 149, applies this principle and states the exception that exists with respect to the application of Section 1475 of the Civil Code of California. Restatement of Contracts, Section 31 (2) declares the rule to be:

“A discharge of the promissor by an obligee in fraud of a co-obligee is inoperative to discharge the promissor’s duty to the extent of the co-obligee’s interest in the performance, if the promissor gives no value, or knows, or has reason to know of the fraud.”

**(A) Defendant had notice or actual knowledge of fraud.**

In the case at bar numerous circumstances were established that disclosed that the defendant did have actual notice or knowledge that fraud was being perpetrated on the plaintiff by Elizabeth J. Price and George E. Burton. Limiting reference to those elements which are before this Court by the findings made, we direct the Court’s attention to the unusual circumstances that surrounded the forged assignments which occurred at the outset of this fraudulent transaction.

Finding of Fact IX (Tr. R., p. 41) discloses that the assignments on the 575 shares of stock were made up and purportedly executed at the Brotherhood State Bank of Kansas City, Kansas, and sent to the defendant, purporting to assign said 575 shares of stock to “Mrs. Elizabeth J. Price or George E. Burton.” These forms of assignments were received by the defendant January 22, 1929, apparently with no signatures guaranteed. The assignments were returned to the Brotherhood State Bank with the request that the signatures of the transferors be guaranteed. On February 1, 1929, defendant again received said assignments, with the signatures of Elizabeth J.

Price and George E. Burton guaranteed, but *no guaranty* of the signature of Lester W. Hurley.

On February 7, 1929, defendant *again* returned the forms of assignment, suggesting that the transferee designation be changed to joint tenancy, and *again* requesting that the *signature* of plaintiff be guaranteed. The change in the designation to joint tenancy was made without any knowledge or authority on the part of the plaintiff, and the fact that this change was made was fully known to the defendant for plaintiff's purported signature was on the instruments prior to the change in the form of assignment.

Then on February 19, 1929, defendant received the forms of assignment with the alteration which changed completely the legal effect of the instruments, and for this reason alone rendered them void, with the guarantee of the purported signature of Lester W. Hurley. On the basis of these altered instruments, and without any inquiry whatever as to the irregular and unusual reluctance to guarantee the purported signature of the plaintiff, all of said stock was transferred on the books of the company.

These transfers, therefore, were made on assignments that the defendant knew were altered; that said alterations were made without plaintiff's consent (Tr. R., p. 40); that defendant made no inquiry of plaintiff concerning said alterations although plaintiff's address was of record with the defendant company (Tr. R., p. 40).

The great majority of the authorities agree that an alteration made under such conditions vitiates the instrument. In the case of *Davis v. Eppler*, 38 Kan. 629, 1. c. 633, 16 Pac. 793, the rule is stated:

“It is the policy of the law to allow no tampering with written instruments. The holder of a note has no right to alter it without the consent of all the parties interested, and such unwarranted alteration

should make it null in his hands, no matter how pure his motives may have been in making the alteration." *Insurance Company v. Martindale*, 75 Kan. 142, l. c. 146, 88 Pac. 559; *Commonwealth National Bank v. Baughman*, 27 Okla. 175, 177, 111 P. 332.

2 C. J. 1174, Sec. 4, states the rule to be:

"The rule supported by the great weight of authority is that if the legal import and effect of the instrument is in fact changed, it does not matter how trivial the change may be, or whether it may be beneficial or detrimental to the party sought to be charged on the contract \* \* \* As a general rule any material alteration of a written instrument after its execution by a party claiming thereunder or with privity, without the authority or consent of the other party or parties to the instrument, invalidates the instrument."

It further appears that all of these assignments bore the purported signature of Lester W. Hurley (Tr. R., p 26), whereas the stock was issued to Lester Hurley (Tr. R., p. 36), and therefore the acceptance of said assignments was in violation of the company's rule that assignments must be executed exactly as the name appears on the face of the certificate to be properly executed assignments. As stated by the trial court "the defendant accepted anything."

It cannot be said that the defendant is without notice or knowledge of the fraud involved in these assignments, which embrace actual forgery, when it accepted and acted on the assignments with knowledge of the fact that they were not properly executed assignments. Further, that they were signed under such circumstances as to give the company notice that they were invalid by reason of spoilation and alteration subsequent to the purported signing.

It must also be remembered that defendant must have known that plaintiff was entitled to the issue in his name of the stock warrants provided for in resolutions of the company and the letter explanatory thereof (Finding XXVIII, Tr. R., p. 57). No warrants were so issued and all information was concealed from him.

The rule of law applicable to this situation is stated in *Karke v. Bingham*, 123 Calif. 163, 55 Pac. 759, as follows:

“This is but the declaration of the equitable rule enunciated in Section 19 of the Civil Code. Every person who has actual notice of circumstances to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact.”

*Lady Washington Consolidated v. Wood*, 113 Calif. 842, 45 Pac. 809.

It is evident that by the exercise of a fractional part of the diligence the defendant owed to the plaintiff as trustee of his property that it could have ascertained and become fully informed of the fraud being perpetrated upon the plaintiff.

It had ample reason for distrust and suspicion, as well as the opportunity and means of securing full information. When plaintiff finally learned of the fraud, the plaintiff responded by telegraph, and immediately disaffirmed all of said transactions (Tr. R., p. 47). The defendant herefore stands convicted of knowing or having reason to know of the fraud and irregularity involved in said assignments, and for this reason alone the defense now relied upon California Civil Code, Section 1475, does not and cannot apply.

**(B) Constructive or imputed notice of fraud.**

It has been found and conclusively determined that the purported signatures of Lester W. Hurley appearing on the assignments of the 575 shares of stock are forgeries, and that this finding is final, binding and *res adjudicata* between plaintiff and defendant herein (Finding XVII, Tr. R., p. 50, and Conclusion of Law I, Tr. R., p. 58).

All cash dividends on said stock, as well as all stock rights, were paid to Elizabeth J. Price after said forged instruments were received by the defendant. The question therefore arises as to whether or not said payments so made on these shares were made with constructive or imputed notice of fraud being perpetrated against plaintiff by the use of said forged instruments.

There can be no question but that the law places a duty on a corporation to make no transfer of stock on its books or to otherwise so act as to destroy the rights or interest of a stockholder except on a *genuine signature* of a stockholder authorizing the action taken.

Confining our attention, however, to the effect of the forgery itself, on the question of knowledge on the part of defendant as to the fraud involved, it becomes immediately evident that forgery as distinguished from fraud of other types and character carry notice of the fraud on its face. Forgery does not require outside or independent information to advise or to inform the defendant company that fraud was involved.

A forgery does not become a forgery when it is discovered and pointed out to a party, but it is a forgery from the very time the spurious signature was placed on the instrument and the party dealing with that signature is bound as a matter of law to know that it is a forgery. If he acts on said forged signature, he does so at his peril.

The defendant company well knew this to be the law,

and for that reason is protected itself in the first instance by repeatedly demanding a guarantee of the plaintiff's signature. The forged instrument *ipso facto* carried positive, definite, and legal knowledge, and notice of the fraud, from which defendant cannot exonerate or excuse itself, on the claim that it thought, if it did, that the signatures were genuine.

The forged instruments *ab initio* carried home to the company the same knowledge that the plaintiff was being defrauded and his rights destroyed as a matter of law, that would have been carried home to the company if they had had a direct communication from any source that the instruments were forgeries.

Now, if the defendant company can say that it is exonerated or excused from the effects or injuries produced by reason of forgery, even though by guarantees, it protected itself from financial loss produced as a result of the forgery, and yet by the claim of ignorance or lack of knowledge that the instrument is forged, relieve itself, and place upon the victim of the forgery the loss in any respect incident thereto, it is evident that ignorance becomes a shield, and lack of diligence a virtue.

A forged assignment is the same as no assignment at all, and the company acting thereon incurred the same liability, and is charged with the same legal responsibility, and the same knowledge, as if the assignments were blank and bore no signature of the party whatever.

When a forgery exists the party acting upon the forged instrument is charged with the same knowledge as a matter of law, except for possible *mala fides*, as would be the case if he had actual knowledge and understood the instrument was a forgery in fact. This is the universal holding on this point, and it is based on the law that a corporation is bound to know the signature of a stockholder when the same is submitted to it, and the language

of the court in the case of *Telegraph Company v. Davenport*, 97 U. S. 369, is directly in point:

“Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of the stock books and it is their duty to see that all transfers of shares are properly made either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who has perhaps acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of law, requires in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall in cases of unlawful appropriation of property upon those who have been misled and defrauded. Decree affirmed.”

To the same effect in *Chicago Edison Company v. Fay*, 164 Ill. 323, 1. c. 328, 45 N. E. 534. This was a case

wherein stock was transferred by a corporation upon forged assignment. The court said:

“The decree below was right, and was properly affirmed by the Appellate Court. Appellant acted at its peril in cancelling Fay’s certificate of stock and in issuing to others other certificates therefor on forged assignments. Forgery can confer no rights or authority upon anybody. I Cook on Stockholders, section 365; *Telegraph Company v. Davenport*, 97 U. S. 369.”

In the case of *Cooper v. Spring Valley Water Company*, 171 Cal. 158, 153 Pac. 936, the court said:

“Its action in transferring the stock would operate to clothe the transferee with the apparently legal title to the stock. It was, therefore, bound to exercise good faith in its determination of the matter. It elected in the present instance to accept the bank as the owner, and in doing so it admitted that its right to make the transfer at the request of the bank depended on the question whether Terrill previously had the right to possession of the certificate, or whether that right was vested in the Lockhead estate. In accepting from this source the certificate issued to Lockhead and making a transfer thereof to the bank, the defendant became the medium by which the title claimed by Terrill was transferred to the bank. In legal effect the title passed from Terrill to defendant for the purpose of transfer, and from the defendant to the bank. For the moment of time necessary for the title to pass through it from Terrill to the bank it was the successor of Terrill. Its conduct could be based only on Terrill’s right.” (Emphasis ours.)

The case of *Tafft v. Presidio Railroad Company*, 84 Cal. 131, 24 Pac. 436, is directly in point. The court said:

“Respondent had a right to rely on the observance by appellant of its own by-laws and the laws of the

state in the transaction of its business. Appellant was under no obligation to permit a transfer until the requirements of its by-laws and the laws of the state were fully complied with. A purchaser of stock does not receive the certificate of his vendor, but a new one, made out in his own name and reciting nothing contained in the former. He is therefore protected in the enjoyment of his purchase even though there was no right to make the transfer to him. For this reason an unauthorized transfer is a wrong done to the owner of the stock, for which not only the person who makes it, but anyone knowingly assisting in the wrong, is responsible. The bank or other corporation, and also these defendants, are trustees to a certain extent to the stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner.”

The court further held:

“Appellant invokes the familiar rule ‘that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same,’ but it was the appellant in this case who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it. As was said in *Bayard v. Farmers & Mechanics Bank*, 52 Pa. State, 232.”

“With them (the corporation) was the registry and transfers could be made only with their consent, by the surrender of the certificates and the issue of new ones \* \* \* as respondent was divested of her property by the unauthorized act of appellant it must be held responsible to her for the damage she has suffered in consequence of such wrongful act.”

In the case of *Chew and Goldsborough v. The Bank of Baltimore*, 14 Ed. Reports 299, the controlling facts are

very similar to those involved in the case at bar. In this case Chew Schnebly, Administrator, obtained from Lowman Chew, an infant of unsound mind, a bill of sale and power of attorney for certain shares of stock in the defendant company and, without paying any consideration therefor, presented said power of attorney to the defendant company and secured a transfer of said stock to himself on the company's books. Suit was brought to recover said stock on behalf of said infant, and the dividends. In its opinion the court said:

“As we understand the case, the charge of fraud is made against Schnebly alone, though it is alleged that, *by construction of law*, the bank is responsible for the consequences of the means employed by Schnebly to obtain the transfer, for the reason that the papers presented by Schnebly, and on which the transfer was made, did not show that he had legal authority for doing what he proposed to do. There is no averment that the bank had any agency in procuring the execution of the bill of sale. On the contrary, the procurement is ascribed to Schnebly, and the bank is charged with liability, by reason of the mental imbecility of Chew, rendering that paper null and void. As to the fraud, the case is made out against Schnebly, and against the bank, as to the charges on which its responsibility was said to depend. We do not consider the bill as having charged fraud, in fact, against the bank, and, it is proper to add, that its conduct in the matter is not open to censure on that ground, however incautious its officers may have been in recognizing papers of the validity of which they had no knowledge. \* \* \* The case does not show that Chew received one cent for the stock. \* \* \* The bank cannot say that Lowman Chew appeared to be sane, and that there was nothing to excite suspicion as to the state of his mind, for its officers dealt with Schnebly without even seeing Lowman Chew, and if misled or deceived by Schnebly, the consequences

ought not to fall on Chew. It is true that transfers may be made under power of attorney, but this means a *valid power*, and the bank takes the risk depending on its execution. \* \* \* In case of forged powers the bank is liable and so as to the acts of *femes covert* and infants. In all such instances, it may be said that everything appeared to be fair and plain; *that the officers did not know the instrument was forged*, or that the party was a married woman or an infant, yet the corporation must meet the consequences, because the law declares that *forged instruments are void*, that married women are not *sui juris*, and that infants are incapable to contract except in specified cases. According to the established doctrine, the acts of lunatics and infants are treated as analogous, and, in this view of the case, the transfer may be avoided. In all these instances, there may be no actual fault on the part of the bank, but the legal conclusion results from the justice and expediency, in such transactions of casting the loss on those who can best provide against it. A bank may refuse to recognize the power of attorney if not satisfied of its entire genuineness. It may require the personal attendance of the party, for the very purpose of determining such matters of fact as may give rise to disputes." (Emphasis ours.)

The principle of law that a corporation is charged with knowledge and bound to know the signature of a stockholder is the same thing as saying it is bound to know a spurious or forged signature of a stockholder. That which a corporation is bound to know embraces, of necessity, knowledge of the fact. The defendant was bound to know that plaintiff was a minor. *Lee v. Hibernia Savings Society*, 177 Cal. 656, 171 Pac. 677; *Williams v. Leon T. Shettler Co.*, 98 Cal. App. 282, 276 Pac. 1065.

The same principle of law is applied to banks. A bank is bound to know the signatures of its depositors. The

forged signature of a depositor on a check carries knowledge to the bank that the check is fraudulent, of which fact the bank is charged with knowledge.

The case of *First National Bank v. Allen*, 100 Ala. 476, 14 So. Rep. 335, declares the rule:

“The correct principles by which the respective liabilities of a bank and depositor are determined are these. The bank is bound to know the signatures of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against a depositor.”

The phrase, “however skillfully executed,” indicates clearly that it is immaterial whether or not the bank had actual knowledge or realization that the signature was a forgery. It is held to have had knowledge of that fact, regardless of how artfully it may have been deceived. *Bank of Brunswick v. Thompson* (N. C.), 93 S. E. Rep. 849.

In the case of *Trust Company v. Bank*, 154 Mo. App. 89, l. c. 100, 133 S. W. 357, the court states the rule to be:

“The law is well settled that a bank is *conclusively presumed* and bound to know the signature of its customer when the signature appears as drawer on a check, drawn upon that bank purporting to be signed by the customer.” (Emphasis ours.)

7 C. J. 683 is to the same effect.

As above indicated, there can be no doubt that the same duty rests on a corporation to know the signature of a stockholder as that which rests upon a bank to know the signature of its depositor. The forged signature therefore, in and of itself, carried notice to the defendant of the fraud which was inherent in the forgery, and therefore

created that which must be taken to be the legal equivalent of direct knowledge.

In other words, forgery by necessary implication involves fraud, and since the law binds a corporation to know the signatures of its stockholders, a corporation that acts on a forged signature must be held to have acted with notice and knowledge of the fraud embraced in the forgery.

The conclusion is unavoidable that since all payments were made after the forged assignments were received, said payments were made with legal notice and knowledge that a fraud was being perpetrated by Elizabeth J. Price on the plaintiff herein, and consequently on the basis of this fact alone, Section 1475 of the Civil Code of California has no application. Restatement of Contracts, Sec. 131 (2).

## V.

**The court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant had actual knowledge as a matter of fact and law that plaintiff was being excluded from the dividends and stock rights and this exclusion is the fraud that is referred to in the exception read into Sec. 1475, Civ. Code, by the decisions.**

We have considered above under point IV the question of defendant's knowledge, actual or constructive, of the fraud perpetrated by Elizabeth J. Price against the plaintiff. In so doing, we have confined our analyzation of the point to the question of the defendant's knowledge of the actual fraudulent acts—forgery—deceit—alteration and concealment practiced.

However, a careful reading of Section 1475, Civ. Code of Calif., together with the decisions applying said statute, will immediately disclose that while such fraud

will preclude reliance on the statute, the exception to said statute is not limited to or based upon knowledge of this character of fraud. The exception read into the statute as it applies to the discharge of an obligation to joint credits is knowledge of the *fraud of exclusion* of one joint creditor from the benefits of a joint fund.

As in the case of the Statute of Frauds and other statutes, by decisions going back to the earliest of English Reports, an exception has been read into the rule sought to be covered by Section 1475 of the Civ. Code of Calif., precluding its application where the obligor knows, or has reason to know, that fraud is being perpetrated. The fraud in this instance is that which is involved in the exclusion of benefit of the joint creditors, as shown in the illustration given in Restatement, Contracts, Sec. 131, p. 149.

“A, B and C are severally, jointly, or jointly and severally entitled to have D pay them \$1,000. The money when received by them is by their arrangement with one another, to be shared equally. D knows of this arrangement. A gives D either a release which purports to discharge A’s individual right, or a release which purports to discharge the rights of A, B and C. The consideration in either case is a *discharge by D of a claim which is due him from A individually*. The release operates as a satisfaction of only the one-third interest of A in the performance due from D.” (Emphasis ours.)

This illustration finds support and approval in the case of *Stark v. Coker*, 20 Calif. (2d) 839, l. c. 844, 129 Pac. (2d) 390, 393, wherein one joint tenant secured from the obligors for his own benefit notes in the discharge of the entire obligation.

The court, after quoting Civ. Code, Section 1475, said:

“That rule (Sec. 1475) cannot be applied under the circumstances presented here. The note was made payable on its face to plaintiff and Hilda Stark as joint tenants. \* \* \* Defendant having executed these instruments, will be deemed to have known the authority of those persons as to each other with respect to one of them entering into an accord and satisfaction of the debt. Plaintiff had no knowledge of the purported accord and satisfaction, and did not authorize it. \* \* \* One of the characteristics of joint tenancy is equality of the interest held by the respective tenants (Civ. Code, Sec. 683), and defendants by giving the note and deed of trust were advised of that rule. It has been consistently held that one joint tenant has not by reason of the relationship any authority to bind his co-tenant with respect to the latter’s interest in common property” (citing many cases).

The Stark case, *supra*, is the last direct decision on the point in California. It follows that since a joint tenant has no authority to bind the excluded joint tenant to a discharge of the obligation where the obligor knows of the exclusion, as in the case at bar, Civ. Code, Sec. 1475, constitutes no defense.

Again, in the case of *Cober v. Connolley*, 20 Calif. (2d) 741, 128 Pac. (2d) 591, where Sec. 1475 of the Civ. Code is applied, the facts involved failed to create the basis for the exception applied in *Stark v. Coker*, *supra*.

In this case payment was made to one of the joint tenants in a note without knowledge of the other joint tenant. The obligor likewise had no knowledge of the fact that the joint tenant to whom payment was made was excluding his co-tenant from benefiting therefrom. The court said:

“The appellants do not claim that Cober did not give value, or that they had knowledge concerning Eversole’s failure to account to the other payee of the note.”

The basis for the distinction as to the application of the rule of Civ. Code, Sec. 1475, in the two cases is therefore readily apparent. In the case at bar when the stock was transferred out of plaintiff’s name, knowledge was necessarily brought home to the defendant that plaintiff was being *excluded*, and when payment was made on authority of Dividend Order No. 12743 on the 88 and 191 shares of stock (Finding XX, Tr. R., p. 53) it was likewise apparent to defendant that plaintiff was being *excluded*, and the rule laid down in *Stark v. Coker* is controlling.

Probably the leading case on which the exception is predicated is the early decision of *Lemiette v. Starr*, 33 N. W. 832, 833, 66 Mich. 539.

There in a suit on a note it was asserted by the defendant that a co-obligee had accepted a new note covering the indebtedness, which latter note was not due. However, there as here, notice had been imparted that the obligee in accepting the second note intended to exclude his co-obligee from its benefit. What the court said in rejecting the defense and holding the original obligation to be satisfied therefore should control here. It was pointed out:

“They had requested him to pay it on several occasions, and, while promising to do so, he had never fulfilled the promise. Soon after the suit against the Keystone Company was ended, the plaintiffs, being both together, requested defendant to give them security upon his house and lot. This he refused to do, but offered to give them his note, which they refused to take; and so the matter ran on until March, 1886, when, as defendant testifies, he had several conver-

sations with Mr. Lemiette, who asked him for the money, and he told him that he could not pay him, and he then asked him to give him his note, said he wanted it for the balance due him and Richards, and he told him that he would give it to him for a year; that Mr. Lemiette *wanted the note given in his name*; that he was *claiming all the time that Richards had got most of his pay, and there was nothing coming to him*, and so he gave him the note *in his individual name.*" (Emphasis ours.)

The court held:

"The partnership relation did not authorize Lemiette, as agent of Richards and himself, to take a note *in his own name intended for his individual use*. It was outside of the scope of the partnership business, and beyond the authority of a partner in closing up the affairs of the partnership. He could not, by collusion with the debtor of the firm, obtain a security *in his own name, and for his own benefit, to the exclusion of his partner.*" (Emphasis ours.)

This holding would apply with even greater force where, as here, the stock was transferred entirely out of Hurley's name. Certainly the defendant then knew Hurley was being *excluded*, thus precluding reliance on Section 1475.

## VI.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) that neither dividends nor stock rights constituted deposits in the hands of defendant, for the reason that when said dividends are set aside they are paid to the company as a deposit and the exception as to deposits stated in Sec. 1475, Civ. Code, applies.

Section 1475 in its entirety, including its caption, appears in the California Civil Code as follows:

“Section 1475. Performance to one of joint *creditors*. An obligation in favor of several persons is extinguished by performance rendered to any of them, *except in the case of a deposit* by owners in common, or in joint ownership, *which is regulated* by the title on deposit. (Enacted 1872.)” (Emphasis ours.)

It will be observed first that the section heading refers to performance to one of joint “creditors.” Furthermore, as shown herein, “setting aside” the dividend placed the dividend in trust and in the category of “deposits” regulated only “by the title on deposits.” Not only does the express exception set forth in Section 1475 exclude deposits, but it will also be shown that the title on deposits likewise precludes application of Section 1475 by setting up conflicting rules as to performance.

**(A) Setting aside the dividend created a deposit subject to the rules in the title on that subject.**

It has been expressly held that dividends of a corporation when declared are like “special deposits of a bank,” whether viewed as held as “trustees or agents,” and it is for that very reason that the Statute of Limitations does not run against the claim for the dividends until after demand has been made. (Except where the language of the Code clearly departs from the common law, it will be construed in the light of common law decisions. *Estate of Elizalde*, 182 Cal. 427, 432, 188 Pac. 560. This Court is, of course, bound by the exception declared by the highest court of California in *Cober v. Connolly*, 20 Cal. (2d) 741, 45, 128 Pac. (2d) 591.) This was the holding in, and the words quoted are from, *Scott v. New York Life Insurance Co.* (La., 1944), 16 So. (2d) 685, 686 (point 2).

At least this is the unquestioned holding once the dividends have been set aside. *In Re Associated Gas Co., C.*

C. A. (2d), 137 Fed. (2d) 607, 610; *In Re Interborough Consol. Corp.*, C. C. A. (2d), 288 Fed. 334 (cert. denied, 67 L. Ed. 1215); *In Re Sutherland*, C. C. A. (2d), 23 Fed. (2d) 595; *McLaren v. Crescent Planing Co.*, 93 S. W. 819, 821; 18 C. J. S., Sec. 467, page 1115, Note 5. Compare, also *MacDermot v. Hays*, 175 Cal. 95, 114, 118, 170 Pac. 616; *Smith v. Taeckor*, 133 Cal. App. 351, 352-3, 24 Pac. (2d) 182.

In the McLaren case, *supra*, it is held that "setting apart of such a fund is a payment to the corporation as trustee for the use of the stockholder."

Whenever money has been set aside for a "specific and definite purpose" it is a deposit subject to the Code title on that subject. It was so held in *Ennis-Brown Co. v. Richdale Land Co.*, 47 Cal. App. 508, 510-11, 190 Pac. 1064.

In that case \$4500 was sent by check to the one holding a mortgage on growing crops with direction that the money should be applied to the purchase of the crop, a contract with the grower having been previously made by the sender, calling for a down payment in that amount. The crop having been below the original estimate an excess remained over what had been called for by the contract. In the action brought for the excess the question was whether the action could be maintained against the mortgagee, to whom the money was given, or the holder of the crop with whom the contract of purchase had been made. In holding the mortgagee liable the court found it necessary to define the relation created and the Code title applicable. It was there said:

"The acceptance of the money for a definite purpose carries the implication that it would be used for that purpose. This seems too plain to require argument." (*Ennis-Brown Co. v. Richdale L. Co.*, 47 Cal. App. 510.)

And again:

“We need not quibble as to the proper legal terminology to characterize the relation of the parties. In a general sense, though, *it is proper to say that a trust was created by express agreement*, and it imposed upon defendant the obligation to pursue the course we have indicated. More specifically stated, the Richdale Land Company became a voluntary *depository within the meaning of Section 1874 of the Civil Code, providing: ‘A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depository.’*” (*Ennis-Brown Co. v. Richdale L. Co.*, 47 Cal. App. 511.) (Emphasis ours.)

And continuing, the court said:

“Appellant makes the mistake of supposing that the case involves a general deposit, whereas, we are dealing with a special deposit. It is special because it was limited to *a specific and definite purpose*. The title did not pass to defendant as it would have done if the deposit had been general in its nature. The deposit constituted a bailment with the title remaining in the bailor and the bailee acquired no right to make general use of the property. The distinction between the two kinds of deposits is clearly pointed out in *Anderson v. Pacific Bank*, 112 Cal. 601 (53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063), and *People v. California, etc., Trust Co.*, 23 Cal. App. 199 (137 Pac. 1111, 1115).” (*Ennis-Brown Co. v. Richdale L. Co.*, 47 Cal. App. 511). A more recent case is *Burket v. Bank of Hollywood*, 9 Cal. (2d) 113. *Perkins v. Benquet Consol. Mining Co.*, 55 Cal. App. (2d) 720, 132 Pac. (2d) 70, l. c. 84.

In the *Burket* case, *supra*, the bank, in its escrow department, held moneys which under the terms of the es-

crow were to be paid to Burket. Checks were so issued but the bank failed before the checks were honored. In determining that the claim thereon should be paid on a preferred basis over general creditors, the court held:

“These records clearly show that the money on deposit in the escrow account at the time the bank closed its doors was no part of the general assets, but had been entrusted to it for distribution in accordance with an escrow agreement. Under such circumstances it was a *special deposit*, title to which did not pass to the bank (citing cases). Being a special deposit, the owners are entitled to it in preference to the bank’s general creditors and the original claims filed with the superintendent of banks are a sufficient basis for recovery.” (*Burket v. Bank of Hollywood*, 9 Cal. (2d) 116.)

To the same effect: *Anderson v. Pacific Bank*, 112 Cal. 598, 600-1, 44 Pac. 1063 (money deposited as security); *Bank of America v. California Bank*, 218 Cal. 261, 274, 22 Pac. (2d) 704 (being money due through an escrow).

As pointed out in the last cited case, it is not necessary that the money be held in kind to be a deposit.

In the case of *Jerome v. Cogswell*, 204 U. S. 1., the court said:

“It follows, as held, that the transfer of shares after the reduction of June 9, 1900, did not carry any right to an interest in the special trust fund, the proportionate interest therein having vested in the then stockholders as dividends.”

**(B) The title on deposit of itself likewise precludes reliance on Section 1475.**

The reason for the express exception of deposits contained in Section 1475 is obvious. The nature of the trans-

tion calls for additional responsibility and care. No escrow holder and no corporation would issue a check to one of several persons jointly entitled to receive moneys any way of dividend or through the escrow without specific authorization of the others.

The section on deposits precludes reliance on Section 1827 by setting up a different measure of responsibility. It may be noted that Sections 1822 and 1823 of the Civil Code under this title, as in the case of the law on stock dividends, provide that delivery must be made on demand and need not be made prior thereto. Section 1827 of the Civil Code under this title specifically covers the obligation of the depositary where the property to be delivered is owned either "*jointly or in common.*" That section provides:

"Section 1827. Delivery of thing owned jointly, etc. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the *depositary may deliver to each his proper share thereof*, if it can be done without injury to the thing." (Enacted 1872.)

As permitted by that section, the defendant herein could have delivered to each of the joint owners "*his proper share thereof*," since it could have been done without injury to what was to be delivered. The enumeration of this method under familiar rules of construction excluded the other now sought to be relied upon.

Section 1828 enumerates another exception which would permit the delivery of the whole to one of several joint owners, but this section expressly limits this privilege to where the deposited sum is made deliverable or payable "*to either or to their survivor.*" In other words, a special authorization must be had permitting the depositary to deliver to "*either*" before that can be done.

The defendant herein by its conduct indicated its realization that it must comply with these sections for, according to its own admissions, when it was advised that Hurley was to be excluded, it, in turn, called for a written direction (divided orders) permitting it to pay to Mrs. Price alone (Tr. R., p 27d). These orders being invalid the depositary is not exonerated, and none of the defendant resolutions and none of the stock certificates contained "the either or clause" which was essential to application of Section 1828. (The exception of fraud by decisions discussed herein would also apply to these sections.)

## VII.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), for the reason that defendant not only knew that plaintiff was being excluded from payment of dividends and stock rights, but violated its own resolutions in failing to issue warrants in plaintiff's name and give information required by said resolutions.

It has been pointed out above that by provision of resolutions passed by the company (Tr. R., p. 57), that plaintiff was entitled to have issued in his name and delivered to him stock warrants covering said stock rights, together with a letter explanatory of said rights. These warrants, however, were issued and delivered, as shown by the admission of the defendant, to Elizabeth J. Price (Tr. R., pp. 26, 45, 53).

On the basis of these facts it appears that defendant not only knew that plaintiff was being excluded from all interest in all dividends and stock rights, but that defendant was violating its own resolutions by failing to issue and deliver said warrants to plaintiff on stock standing in his name on defendant's books. In further violation of plaintiff's rights defendant actually suppressed and con-

concealed from the plaintiff information to which plaintiff was entitled.

This violation by defendant of its own resolutions and the concealment of information connected therewith, directly contributed to and made possible the misappropriation of all of plaintiff's dividends and stock rights, both on the 88 and 191 shares of stock, standing in his name, as well as that which had been transferred out of his name.

It follows that by reason of this fraud and concealment alone, that the exception to Sec. 1475, Civ. Code of California, comes into operation and eliminates Sec. 1475 as a defense. Restatement of Contracts, Sec. 31 (2), page 149. *Stark v. Coker*, 20 Calif. (2d) 839, 1. c. 844, 129 Pac. (2d) 390, 393.

### VIII.

**The trial court erred in its Conclusion of Law XII (Tr. R., p. 63) that plaintiff was not entitled to interest on dividends wrongfully paid to Elizabeth J. Price prior to the date of demand for the reason that demand would have been vain and was therefore waived.**

In Conclusion of Law XII the court declared the law to be that plaintiff would not be entitled to interest prior to the date of his demand for payment of the dividends. This was error since it stands established by the court's Finding XIII (Tr. R., p. 45) and Finding XXII (Tr. R., p. 4), that plaintiff was at all times entitled to receive one-third of all the dividends and stock rights declared and set aside.

It is evident that since plaintiff's stock had been transferred on the books of the company and payment made on the basis of the invalid dividend No. 12743, that any earlier demand for the payment of said dividends would

have been ignored and disregarded, the same as the one which was made on October 15, 1945. For this reason under the law said demand would have been a useless act, and therefore not required.

The rule is well stated in *Perkins v. Banquet Consolidated Mining Company*, 55 Cal. App. (2d) 720, 132 P. (2d) 70, l. c. 99:

“Interest is allowed after default by non-payment as part of the damages suffered by the party to whom payment is due. Section 3302, Civil Code; 8 Cal. Jur., p. 789, Sec. 48; 25 C. J. S. Damages, p. 535, Section 51; 30 Am. Jur., p. 6, Section 2.”

It is true that it is the general rule that dividends do not bear interest until demand for payment; however, the Perkins case, *supra*, points out that wherever from the circumstances it is apparent that a demand would be fruitless it is not required. The Court said (132 Pac. (2d), l. c. 97):

“The law does not require useless acts. A demand is not required where it is plain that it would be unavailing. See cases cited, 1 Cal. Jur., p. 343, Section 30. Interest was allowed in the Perkins case on each dividend from the date declared.”

Sec. 3287, Civ. Code of Cal., provides:

“Every person who is entitled to recover damages certain \* \* \* is entitled also to recover interest thereon from that day \* \* \*”

In the case at bar it is manifest that a demand by Hurley at any time after the transfer of the 575 shares on the books of defendant company on February 19, 1929, for the payment of the dividends and the delivery of the stock rights to him would have been unavailing.

Defendant from that time definitely disregarded Hurley's interests and ownership, not only as to dividends and stock rights before his title was established by suit in the case of *Burton v. Hurley* (Tr. R, p. 49), but has continued to disregard his right to said dividends and refused to comply with demands to pay and deliver the same, as well as the value of said stock rights, since his title was so established in the Kansas case.

It is clear therefore that interest is due the plaintiff on these dividends and on the value of these stock rights from date of payment to Elizabeth J. Price. Further, since demand for payment was impossible by reason of plaintiff's lack of knowledge, as well as by reason of the fact that it clearly would have been fruitless if made, such demand is not required.

The right of the plaintiff in the case at bar to interest as above stated is declared to be the law, 14 C. J. 777, section 1177, as follows:

“In addition to having his rights as a stockholder restored the owner may recover dividends which have been declared but not paid to him during the time his name did not appear on the corporation's records as a stockholder, with interest thereon.”

(B) The plaintiff is likewise entitled to interest on the dividends declared and stock rights delivered to Elizabeth J. Price on the 191 and the 88 shares that remained in the name of the plaintiff on the books of the company from the time said payment and delivery was made for the reason that dividend order 12743 relied on by defendant as justification for said payments is and was at all times void as constituting a declaration of power by a minor, as pointed out herein (Tr. of R., p. 60).

It follows from Finding of Fact XXVIII, Tr. R., p. 57, that by defendant's acts of concealment plaintiff was prevented from acquiring knowledge as to his rights to said dividends as well as his ownership in said stock and thus prevented from making demand for said dividends at any earlier time. Defendant, therefore, cannot *take advantage of its own wrong* and rely upon the lack of demand on the part of the plaintiff for payment of said dividends. This concealment by defendant company of said stock rights and ownership of plaintiff's interest in said stock directly produced or contributed to plaintiff's loss of the dividends for all of these years and interest only constitutes payment for the loss thus inflicted.

It has repeatedly been held that fraud and concealment will prevent the running of the Statute of Limitations. Likewise, it has been held in the case of *Miles v. Bank of America, etc.*, 17 Calif. App. (2d) 397-8; 62 P. (2d) 177:

“That when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promissor is estopped from taking advantage of the act or omission.”

*Verdugo Canon Water v. Verdugo*, 152 Calif. 655, 1. c. 683 (93 Pac. 1021), *John V. Neff v. New York Life Insurance Co.* (April 26, 1946), 74 A. C. A. 208, 1. c. 215, Restatement on the Law of Torts, Chapter 44, Sec. 478, Subdivision C, Chapter 44, Sec. 879.

The analogy by which the rules of law stated in the last above cited cases becomes applicable to the failure of the plaintiff to make demand for the payment of interest, is strikingly evident when it is realized that through the

violation by the defendant of its own resolutions (Tr. R., p. 57, Finding XXVIII), the plaintiff was prevented from acquiring knowledge of his interest in and ownership of in the stock in question, and likewise prevented from receiving the stock rights therein provided to be issued as warrants in his name. By this fraudulent concealment plaintiff was prevented from making demand, and thus the defendant is estopped to rely upon the rule requiring a demand to avoid the obligation to pay interest from the date each dividend is declared and set aside for payment.

Plaintiff was entitled to interest from the date each dividend was declared and set aside for payment.

## IX.

**The trial court erred in its Conclusion of Law XI (Tr. R., p. 2), for the reason that defendant was bound to know that plaintiff was a minor, and Sec. 33, Civ. Code of California, precludes Sec. 1475, Civ. Code, from applying to minors.**

It has been conclusively adjudged in the case at bar that the dividend orders executed in blank by plaintiff while he was a minor, were voidable (Tr. R, p. 60), under California and Missouri law, and did not constitute a discharge of defendant's liability to said minor plaintiff.

Calif. Civ. Code, Sec. 33; *Hakes Investment Co. v. Lyons*, 166 Cal. 557, 137 Pac. 911 (1913); *Winkler v. Los Angeles Inv. Co.*, 43 Cal. App. 408, 185 Pac. 312 (1919); *Chram v. Poole*, 111 F. (2d) 725, 727 (C. C. A. 9th, 1940). Such acts of a minor are also held to be void *ab initio* under the law of Missouri. *Hodge v. Feiner*, 338 Mo. 268, 10 S. W. (2d) 90 (1935); *Curtis v. Alexander*, 257 S. W. 32, 436 (Mo. Sup. Ct. 1923); *Poston v. Williams*, 99 Mo. App. 513, 73 S. W. 1099 (1903); *Turner v. Bondalier*, 31

Mo. App. 582, 585-586 (1888): *Early v. Richardson*, 280 U. S. 496, 500 (1930); *Dexter v. Hall*, 15 Wall. (82 U. S.), 9, 26 (1872); 18 Am. St. Rep. 630-633; 31 A. L. R. (note) 1001-1021; 43 C. J. S. 84.

It is also the law of California that the defendant was bound to know that plaintiff was a minor. *Williams v. Leon T. Shettler Co.*, 98 Calif. App. 282; 276 Pac. 1065; *Lee v. Hibernia Savings Society*, 177 Cal. 656, 171 Pac. 677.

Now, since under Calif. Civ. Code, Sec. 33, and the cases cited, the plaintiff did not and could not discharge the defendant of its obligation by his own act, by what process of reasoning can it be said that Section 1475 of the Civ. Code works an involuntary discharge? Any such interpretation of the scope and effect of Section 1475 of the Civ. Code would be to repeal and nullify the force, effect and protection given to minors by Section 33 of the Calif. Civ. Code.

It certainly is not the law that the protection given by Sec. 33 of the Calif. Civ. Code is limited to minors, whose property is held in severalty, and does not in any manner protect the minor or his property in the event that the minor holds property in joint tenancy. To so construe the law would be to establish the rule that a minor can be deprived of his property indirectly by force of Sec. 1475, Civ. Code, though he cannot be deprived of his property directly by his own act. This is not the law, and we have found no case that so holds.

It has not only been held that defendant was bound to know that plaintiff was a minor, but the law is well established that "one deals with infants at his peril." *Pollock v. Industrial Acc. Commission*, 5 Calif. (2d) 205, 211, 54 Pac. (2d) 695. In this case the obligor was required to pay twice.

In the case of *Burnand v. Irigoyen*, 30 Calif. (2d) 681; 86 Pac. (2d) 417, the court said:

“The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others.”

In the case of *Turner v. Bondalier*, 37 Mo. App. 536, the court says:

“The deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. \* \* \* It has repeatedly been determined that a power of attorney made by an infant is void. \* \* \* In fact, we know of no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.”

In the case of *Armitage v. Jesse C. Widoe*, 36 Mich. 24, in which the opinion was written by Cooley, C. J., an indirect effort to deprive an infant of his property was involved. The court said:

“It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; if one has only to change the order of proceeding, assume to act for the infant first, and get his authority afterwards, and the principle of law which denies him the power to give the authority is subverted by such a doctrine and is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.” 43 C. J. S. 130, Sec. 53.

It follows from the above that no indirect method, either as to the form in which an infant's property is

held, or otherwise, can be resorted to for the purpose of destroying his ownership. That where a discharge is claimed under Section 1475 of the Civ. Code, by payment to one of several joint creditors, *it must be made to appear that all joint creditors are sui juris.*

If this is not the law, then Section 1475 of the Civ. Code is turned into a means of oppression and the destruction of the rights of a minor, the protection of which the law looks upon with such favor and concern. Such a ruling would be in conflict with all the authorities on the subject. It must be evident that Section 1475 of the Civ. Code was not enacted, and cannot be construed to provide a means and method for the destruction of the very protection thrown around infants by Sec. 33 of the Calif. Civ. Code.

### Conclusion.

That defendant is bound and estopped by its answer, and the admissions made, to rely on Section 1475 of the Civil Code as a defense. That its present position convicts it of actual knowledge of the invalidity of the assignments and dividend orders; that the forged assignments carried notice and legal knowledge *ab initio* of the fraud being perpetrated against the plaintiff; that defendant knew of the alteration and invalidity of the assignments which gave further knowledge of the fraud being perpetrated against the plaintiff; that the fraud of exclusion was being worked against plaintiff; that plaintiff was a minor and defendant could not be discharged of its obligation to him under Sec. 1475 of the Civil Code, as said section only operates as to parties *sui juris*; that for each and all of these reasons and others set out above Section 1475 of the Civil Code con-

stitutes no defense and plaintiff is entitled to judgment for the amount of said dividends and stock rights together with interest at the rate of 7% from the date each dividend and stock right was declared and set aside for payment.

Respectfully submitted,

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No. 12278

IN THE

# United States Court of Appeals

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LESTER W. HURLEY,

*Appellant,*

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,

*Appellee.*

---

**BRIEF ON BEHALF OF APPELLEE.**

---

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*Appellee.*

---

## BRIEF ON BEHALF OF APPELLEE.

---

### Introductory Statement.

For clarity, we will, in this brief, sometime refer to appellant as plaintiff and to appellee as defendant.

This brief of defendant consists of two divisions, Division One, in which reply will be made to each of the nine sections of argument contained in plaintiff's brief and, Division Two, in which defendant will point out several conclusions of law which are believed by defendant to be erroneous and which resolved in defendant's favor would, in any event, necessitate an affirmance of the judgment herein.

### Analysis of Brief of Appellant.

An examination of the brief of appellant reveals that only one major argument is presented, namely—that the provisions of Section 1475 of the Civil Code of the State of California are not applicable in the instant case (Appellant's Brief p. 7). Sections I, II, III, IV, V, VI, VII and IX are all directed to this general proposition.

Section I of the argument is that since the defendant did not plead the provisions of said code section in so many words in its answer, such defense is not available to it.

Sections II, IV, V and VII all urge the inapplicability of said section of the code based upon the contention that despite the trial court's finding to the contrary, defendant had actual or constructive knowledge of a fraud perpetrated upon the plaintiff by his grandmother and uncle.

Section III of the argument urges the inapplicability of said section upon the asserted ground that proceeds of joint tenancy property do not retain joint tenancy characteristics.

In Section VI, plaintiff argues that the dividends and stock rights in question were *deposits* in the hands of defendant and thus expressly excluded from the provisions of Civil Code, Section 1475.

Plaintiff contends, in Section VIII that, assuming said section not applicable, he would be entitled to interest from the date dividends were declared rather than from the date of his demand upon defendant.

In his concluding Section IX, plaintiff argues that said Section 1475 of the Civil Code cannot apply for the reason that the plaintiff was once a minor.

DIVISION ONE.

REPLY TO BRIEF OF APPELLANT.

I.

The Defense of Payment by Defendant to One of Several Joint Tenants Was Presented and Litigated Throughout the Trial.

Plaintiff alleged in his complaint that he had become a joint tenant with his grandmother and uncle in certain shares of stock of the defendant [Tr. Rec. p. 3] but that the defendant paid dividends and issued stock rights on the shares in question to Elizabeth J. Price, his grandmother which said acts he charged to be illegal and unlawful [Tr. Rec. p. 10].

In the answer of defendant, it is admitted, in essence, that the joint tenancy interest had been created in the stock [Tr. Rec. p. 20] and it is admitted that the dividends and stock rights arising in connection with said stock had been paid or delivered to the grandmother, Elizabeth J. Price, but it is denied that such payments or distributions had been illegal and unlawful or illegal or unlawful [Tr. Rec. p. 21].

It is submitted that the foregoing pleadings clearly presented to the trial court for decision the issue as to whether defendant's performance of its obligations to the one joint tenant, Mrs. Price, also satisfied any obligation it had to the joint tenant, Hurley.

Furthermore, prior to a pretrial hearing held by order of the District Court in June, 1946, defendant stated concisely in its memorandum of points of law which it intended to rely upon at the trial that: "The payment by defendant of the dividends accruing to one of the several

joint owners of the stock discharged defendant's liability to all of said owners" [Tr. Rec. p. 33]. (In this connection, note that the date September 23, 1949, appearing in the transcript is the date upon which this portion of the record was added to the transcript and not the date upon which the point was made and submitted in the lower court.)

In any event, the issues upon which this cause went to trial more than three years ago were necessarily framed by defendant's answer to the plaintiff's own allegations. As above pointed out, plaintiff alleged his original joint tenancy interest which defendant admitted; plaintiff alleged that he was wrongfully deprived of this interest by the forgery and fraud of his grandmother and uncle which defendant denied; and plaintiff alleged illegal and unlawful payment of dividends and issuance of stock rights to his grandmother which illegality and unlawfulness defendant denied.

Section 1475 of the California Civil Code is a statement of the California law applicable to a factual situation. Plaintiff's contention throughout the years this matter has been pending has been and now is that he, at all times, remained a joint tenant of the stock involved and he, at all times, has admitted that the defendant paid all dividends on such stock and issued all stock rights in connection therewith to Mrs. Price. It is purely a question of law whether the defendant, in so doing, discharged its obligation to all joint tenants.

Plaintiff entitled his action herein one for an accounting. It is held that such an action is unique in that the issues raised by the pleadings may be only those with rela-

tion to the existence of a relationship which requires an accounting. Any credits proved by the defendant in such an action may be properly considered.

*Whann v. Doell*, 192 Cal. 680 at 684, 221 Pac. 899;

*Davis v. Calif. Motors*, 73 Cal. App. 2d 241 at 245-6, 166 P. 2d 52.

Likewise, when a payment is shown in the plaintiff's complaint, as was the case herein, there is no reason for the defendant to plead the same.

48 C. J. 667, Note 28.

## II.

### **Plaintiff Is Concluded by the Finding of the Trial Court That Defendant Had No Knowledge, Actual or Constructive, of Any Fraud.**

As we have previously commented, Sections II, IV, V and VII of appellant's argument are devoted to the contention that this defendant had both actual and constructive knowledge of the fraud of his grandmother. In this portion of our brief we will reply to each of these sections.

In this connection, the trial court found as follows [Tr. Rec. p. 57]:

"That defendant had no actual knowledge of the fraud hereinbefore found to have been perpetrated upon Lester W. Hurley by his grandmother, either at the time said fraud was perpetrated or thereafter, and the court further finds that defendant has no reason to believe that any fraud was being, or had been, so perpetrated."

In the sections of appellant's brief above noted, appellant challenges Conclusion of Law XI [Tr. Rec. p. 62]

to the effect that defendant had discharged its obligations to the plaintiff joint tenant by its payment of dividends to and delivery of stock rights to or upon the order of his joint tenant Elizabeth J. Price. Appellant argues, *in the face of the finding of fact quoted above*, that the conclusion of law was incorrect in that defendant did have actual or constructive notice of the fraud.

We should observe at the outset that appellant has not included in the Transcript of Record any evidence or testimony which was received by the trial court on this issue of fact and we respectfully contend that in the absence thereof the finding of the trial court is conclusive.

A. In Section II of his argument, appellant asserts that since defendant admitted that it had made payment to one of several joint tenants, it must follow that defendant had knowledge of fraud practiced upon him by another co-tenant.

As we understand this contention of appellant, he argues that since defendant made payments to one joint tenant after it had received purported assignments of certain of the stock, found to be forgeries in an action to which defendant was not a party, defendant must have had knowledge of the assumed fraud by which these assignments were forged.

With all due respect, the complete answer to this contention is that the trial court found that the defendant had no knowledge, actual or constructive, of such fraud. The simple and admitted facts are that the defendant did make payments to one of several joint tenants believing that said joint tenant had, by properly executed documents, obtained the exclusive right to the payments and distribu-

tions made; but this belief cannot be tortured into knowledge of any fraud.

B. Appellant next, in Section IV of his argument, reasons that since defendant had received purported assignments which were forgeries, it was charged with knowledge that they were forgeries and therefore must be charged with knowledge that they were obtained by fraud.

This is the same argument that appellant made under Section II of his brief. In Section II he states that defendant had knowledge of fraud because it admits that it paid to one of several joint tenants; in Section IV, he argues that guilty knowledge must exist because certain assignments which defendant thought to be valid were, in fact, forgeries.

Once again we say that the trial court has found that defendant had no knowledge of any fraud, actual or constructive.

Appellant is now in the position where he concedes that if there had been no forged assignments, the defendant would be completely protected by proof of its performance to one joint tenant. He continues, however, to claim that since there were forged assignments involved which defendant believed to be genuine, defendant is nevertheless bound to know that the assignments were spurious and hence charged with knowledge of fraud. In the very next breath, appellant points out that since the assignments were forgeries, he at all times remained a joint tenant.

C. In Section V of his argument, appellant contends that defendant had actual knowledge of fraud in that defendant knew appellant was being excluded from a share in the dividends and stock rights.

In determining whether the trial court correctly determined in its Conclusion of Law XI that Section 1475 of the California Civil Code applied to protect defendant against the demands of plaintiff, fullest weight must be given to Finding XXVII [Tr. Rec. p. 57] (previously quoted herein) to the effect that defendant had no reason to believe any fraud was being or had been perpetrated upon appellant.

An interpretation of Section 1475 which would place on the obligor the burden of determining that there was no fraud in connection with, or *wrongful* exclusion from the benefits of, the obligation he was performing when performance is made to one of two or more joint obligees, is not warranted, if the obligor otherwise has no reason to believe there is any such fraud or *wrongful* exclusion. Plaintiff's proposed interpretation of this section would have exactly this effect, and would to a large extent, if not completely, nullify the provisions of the section. If any exception is to be made to the application of Section 1475 which is not within the express terms of the section, it should not go beyond that contained in Restatement of Contracts, Section 131, as quoted on page 36 of appellant's brief. Finding XXVII in the case at bar, precludes this exception. Even knowledge on the part of the obligor that one of the joint obligees is being excluded from the benefit of the performance made to another of the obligees, gives no notice to the obligor of fraud, in the absence of some reason on his part to believe such exclusion is wrongful.

The cases cited by opposing counsel do not lend any support to their proposed interpretation of Section 1475. In *Stark v. Coker*, 20 Cal. 2d 839, 129 P. 2d 390 (Sept.

28, 1942), the Supreme Court of California held that one of two joint tenant payees of a \$12,000 note could not discharge the note as against the other payee "for \$3,000, only half of which was paid in cash and the balance has not yet been paid." This result was reached because "Plaintiff had no knowledge of the purported accord and satisfaction and did not authorize it." The rule of this case is simply that one co-tenant has no authority to change or modify the obligation. This rule has no application in the case at bar.

The second case cited is *Cober v. Connolly*, 20 Cal. 2d 741, 128 P. 2d 519 (decided August 21, 1942; rehearing was denied September 14, 1942, two weeks before decision in the *Stark* case, *supra*). There one of the joint tenant payees of an \$850.00 note had, without the knowledge or consent of the two others, agreed to accept "job printing, the publication of legal notices, hotel cards, and newspaper subscriptions, as ordered by him, in payment of the obligation." In pursuance of this arrangement, the maker of the note did printing and advertising to the value of \$1,255, only \$290 of which was for the payee, the remainder being for other persons. Only \$25 to \$30 was paid in cash. The trial court ruled that Section 1475 of the California Civil Code operated to constitute payment of the note and in affirming judgment on appeal, the Supreme Court held:

"Section 1475 is, however, determinative of this appeal. 'An obligation in favor of several persons is extinguished by performance rendered to any of them. . . .' (Applied in *Bailes v. Keck*, 200 Cal. 697 [254 Pac. 573, 51 A. L. R. 930]; *Hoover v. Wolfe*, 167 Cal. 337 [139 Pac. 794]; *Delano v. Jacoby*, 96 Cal. 465 [31 Pac. 290, 31 Am. St. Rep.

201]; *Wright v. Mix*, 76 Cal. 465 [18 Pac. 645]; *Barnes v. Osgood*, 103 Cal. App. 730 [284 Pac. 975].) None of the California cases construing this section was decided upon facts such as those before the court in the present action, and it is true, as contended by the appellants that when one of two or more joint creditors accepts payment of the obligation, he holds the proceeds as a trustee or agent for them and is directly accountable to them as such. But so far as the debtor is concerned, the co-obligee is more than a mere agent; he is the owner of the obligation. 'Since each of several joint obligees is interested in the entire claim, he has the power to discharge the entire claim either by release or by accord and satisfaction, and so a payment or other performance of the whole obligation to one obligee discharges it; and a tender to one is legally a tender to all.' (2 Williston on Contracts [rev. ed. 1938], sec. 343, p. 1014 [and see cases there cited in footnotes 2, 3 and 4].) Section 130 of the Restatement of the Law of Contracts provides: 'Except as the rules of this Section are qualified by section 131 . . . a discharge by a joint obligee of his individual right operates as a discharge of the joint right of all.' Section 131 reads: '. . . A discharge of the promisor by an obligee in fraud of a co-obligee is inoperative to discharge the promisor's duty to the extent of the co-obligee's interest in the performance, if the promisor gives no value or knows, or has reason to know of the fraud.'

"The appellants do not claim that the Cobers did not give value, or that they had any knowledge concerning Eversole's failure to account to the other payees of the note. The fact that much of the printed matter went to others than Eversole, or that Ever-

sole made gifts of many subscriptions of Cober's newspaper, is immaterial, as all such services and supplies were ordered by Eversole with the understanding that they should be credited by him on the note. The performance of the services and the furnishing of the supplies effectually discharged Eversole's individual right against the respondents, and, under the general rule, also discharged the debt as to all of the obligees. The fact that the note was not surrendered to the maker is immaterial. (*Wheeler v. Bull*, 131 Cal. 421, 425 [63 Pac. 732].)"

*Cober v. Connolly*, 20 Cal. 2d 741, 744-745, 128 P. 2d 519 (also reported in 142 A. L. R. 367, with note on p. 371).

The *Cober* case presents a situation where the obligor must have known that two of the three joint tenant payees of the note were apparently being excluded from the benefit of the performance of his obligation. The court in deciding the case had in mind the exception to Section 1475 set out in Section 131 of Restatement of Contracts, as that very section is quoted in their opinion. This apparent exclusion becomes immaterial in the absence of knowledge by obligor of fraud, because the joint payee receiving performance "holds the proceeds as a trustee or agent" for the other payees "and is directly accountable to them as such." This principle applies in the case at bar.

The third case cited, *Lemiette v. Starr*, 66 Mich. 539, 33 N. W. 832, deals only with the partnership relation, there was no performance by the obligor, aside from the giving of a note for a pre-existing obligation and no reference is made whatever to the principle of law embodied in Section 1475, Civil Code.

We submit, therefore, that in the absence of reason on the part of the obligor to know of fraud, Section 1475 applies, and that the obligor is under no duty to the joint obligees when rendering performance to one of them to see to it that all share equally in the benefit of his performance.

D. Lastly, on this phase of the case, appellant in Section VII attributes to the defendant not only knowledge of fraud but actual concealment thereof, basing this upon his assumption that defendant knew that plaintiff was being wrongfully excluded and thereafter failed to furnish plaintiff with any information.

We are at some loss to understand what new or additional point opposing counsel seek to make therein, unless it is that plaintiff, as a stockholder, was himself entitled to receive directly from defendant notice regarding dividends and stock rights. Plaintiff's claim in this action is based upon and can only be based upon a contention on his part that he continued to be a holder in joint tenancy with Mrs. Price and Mr. Burton as to all stock involved. Section 1475, Civil Code, applies by its express terms not only to payment of money due joint obligees, but to the performance of "*an obligation*" thus due. "*Obligation*" is defined by Section 1427, Civil Code, as "a legal duty, by which a person is bound to do or not to do a certain thing." Any duty on defendant to give information or notice to these stockholders in joint tenancy was performed under the terms of Section 1475 by giving notice to any one of them. Mrs. Price, plaintiff's joint tenant, had such notice.

Even without reference to Section 1475, Civil Code, the courts, on the basis of common law principles, have reached

the same conclusion that a joint obligation when barred as to one is barred as to all co-tenants.

*Ellis v. Columbine Creamery Co.*, 83 Cal. App. 48, 52(2), 256 Pac. 489;

*Conrad v. Hæck*, 122 Cal. App. 649, 652(2), 10 Pac. 534;

*Robertson v. Burrell*, 110 Cal. 568, 577, 42 Pac. 1086;

*Sears v. Majors*, 104 Cal. App. 60, 62-63, 285 Pac. 321;

14 Am. Jur. 147-148.

In so far as any other points are made in Section VII of appellee's brief, they are answered in other sections of this brief.

E. In each of said Sections II, IV, V and VII of plaintiff's brief, knowledge of fraud, either actual or constructive, has been attributed to defendant upon the ground that the stock assignments which were involved in the case of *Burton v. Hurley*, decided in the United States District Court for the District of Kansas, were, in fact, forgeries so far as the signature of plaintiff is concerned.

Defendant asserts that it is not bound by such judgment.

This defendant was not a party to said action [Tr. Rec. pp. 29-30].

Although the Kansas court found that the purported signature of the plaintiff herein as appearing in both the stock assignments and upon the dividend order relating to said stock were forgeries [Tr. Rec. pp. 87-88], the court below in this action, upon the evidence adduced herein, con-

cluded that the Kansas judgment was *res judicata* only as to the signatures on the assignments [Tr. Rec. p. 58] and found, as a fact, that, *contrary to the conclusion of the Kansas court, plaintiff did, in fact, sign the dividend order involved* [Tr. Rec. p. 37].

We think the basic law cannot be questioned that a judgment is binding or conclusive only upon those who are parties to the action in which the judgment is rendered and upon those who are in privity with a party thereto.

1 Freeman on Judgments, 5th Ed., Sec. 407.

This basic rule has frequently been applied in decisions of the California courts, reference to only a few of which is made herein.

*Estate of Smead*, 219 Cal. 572 at 577, 28 P. 2d 348;

*Stockwell v. McAlvay*, 10 Cal. 2d 368 at 371, 74 P. 2d 504;

*Victor Oil Co. v. Drum*, 184 Cal. 226 at 239, 193 Pac. 243;

*Drummond v. Drummond*, 39 Cal. App. 2d 418 at 424, 103 P. 2d 217;

*Olinda Irrigation Lands Co. v. Yank*, 27 Cal. App. 2d 56 at 64, 80 P. 2d 170.

Perhaps the most instructive decision arising out of facts similar in some respects to those in the instant case is that of *Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App. 2d 720, 132 P. 2d 70. The facts involved in the *Perkins* case are as follows: Mrs. Perkins, the plaintiff, a resident of the State of Washington had married in the

Philippines in 1914. Her husband previously had been a resident of the State of New York. During approximately fifteen years of marriage, until their separation in 1929, they had acquired many thousands of shares of the defendant company, twenty-four thousand of which had been registered in the name of the plaintiff, and upon which shares dividends had always been paid directly to the plaintiff.

After separation of the parties, a dispute arose between them concerning these shares of stock and the dividends thereon and although Mrs. Perkins served numerous demands upon the defendant that dividends be paid to her, defendant, nevertheless, paid the same to the husband, taking several agreements of indemnity.

The next step was an action in the Philippines in which a judgment was entered against Mrs. Perkins and in favor of Mr. Perkins decreeing transfer to him of the shares in question. The shares of stock were deposited with a trust company in New York, and in 1933 Mr. Perkins sued the trust company pleading the Philippine judgment. Mrs. Perkins was made a party by the trust company and in this action it was ultimately determined that Mrs. Perkins was owner of the shares. Thereafter, the California action was brought by Mrs. Perkins against the defendant company for recovery of the dividends which had been paid after 1930. The ultimate decision in this case was that the decision of the New York court was *res judicata* and that the defendant company was bound thereby.

In at least two very important respects, the *Perkins* case must be distinguished from the case at bar. First, in the *Perkins* case, the defendant corporation had knowingly placed itself in privity with the husband by paying dividends to the husband under an agreement of indemnity with full knowledge at all times of the wife's claims. Second, in the *Perkins* case, the New York judgment dealt only with ownership of the stock as between the husband and wife. The award of dividends to the wife in the New York action as against the husband was solely an incident of the stock ownership.

Since, in the *Perkins* case, the corporation had elected to stand or fall on the rights of the husband and had taken indemnity from him, it, of course, should be bound by the judgment against the husband holding that he had no rights. The corporation was in privity with the husband in the New York action. As is specifically pointed out by the California court, the corporation was at all times, from the beginning of the controversy placed upon notice that the wife claimed the entire ownership of the stock and the right to all dividends thereon.

It is the law, that a judgment fixing ownership of property between two persons is an *in rem* judgment and is *res judicata* as to such ownership against any person not claiming a different title in himself.

The distinctions pointed out above were clearly recognized by the court in the *Perkins* case where it was said

“in the present case, none of the dividends were paid by the corporation to Mr. Perkins without knowledge of the claims of Mrs. Perkins,” and further, “when every dividend was paid to Mr. Perkins or his transferee, the defendant knew of Mrs. Perkins’ claims,” and again, that the corporation “elected to pay these dividends to him and take back from him and his partner indemnity agreements to indemnify the company against the very loss it now faces.”

Lastly, it should be pointed out that the California court conceded that had the defendant paid Mr. Perkins the dividends without knowledge of the claim of his wife, the New York judgment would not have been conclusive:

“We can agree with defendant and with the assumption made in the Bernhard case [Bernhard v. Bank of America, 19 Cal. (2d) 807; 122 Pac. (2d) 892], that in such a case, where the depositary has paid one person without knowledge of another’s claim, *a judgment between the two disputants would not be conclusive against the depositary.* As already pointed out, defendant here had full knowledge of the claims of Mrs. Perkins before it paid the dividends. No estoppel applies against her. No equities exist in favor of defendant.” (Italics added.)

III.

**Dividends Declared on Corporate Stock Held in Joint Tenancy Create a Debt Due From the Corporation to the Co-Owners as Joint Tenants and Section 1475, Civil Code, Applies to Such a Debt.**

In Section III plaintiff devotes ten pages of his brief (pp. 21-30) to the proposition that a dividend declared by a corporation results in a debt due the stockholders which becomes a right separate and distinct from their rights as stockholders. There is no doubt as to the correctness of this proposition. It does not follow, however, that the debt resulting from the declaration of a dividend on stock held in joint tenancy is not due the joint tenants as joint tenants. In the absence of an agreed division of this debt which is an income from the joint tenancy property, the four unities of interest, title, time and possession still persist.

In *Fish v. Security-First National Bank*, 31 Cal. 2d 378, 189 P. 2d 10, the court said:

“The conclusion of the trial court, therefore, that the joint tenancy transactions were valid and that defendant was the owner of a joint tenancy interest in the notes may be accepted as a premise in determining the further question whether the evidence sufficiently supports the correlative conclusion that the funds totaling \$29,012.45 were also joint tenancy property, although standing in decedent’s name. The proceeds of joint tenancy property, in the absence of

contrary agreement, retain the character of the property from which they are acquired (*In re Kessler*, 217 Cal. 32, 35 [17 P. 2d 117]; *Estate of Harris*, 169 Cal. 725 [147 P. 967]; *Bliss v. Martin*, 74 Cal. App. 2d 500 [P. 2d 61], and cases there cited; *Wallace v. Riley*, 23 Cal. App. 2d 654, 665 [74 P. 2d 800]; *Estate of McCoin*, 9 Cal. App. 2d 480, 482 [50 P. 2d 114]).”

*Fish v. Security-First National Bank*, 31 Cal. 2d 378, 387(5), 189 P. 2d 10;

*In re Kessler*, 217 Cal. 32, 35, 17 P. 2d 117;

*Estate of Zaring*, 93 A. C. A. 717, 719, 209 P. 2d 642.

. In the *Zaring* case, the proceeds involved was rent from real property, which, as in the case of a dividend declared on stock, would not pass to a purchaser on the sale of the property from which the income is derived. But in spite of this severance, it was held such proceeds “retain the character of the property from which they were acquired.”

The two English equity cases cited by opposing counsel, if indeed they are contrary to the California cases and Section 1475, Civil Code, can have no force in the case at bar.

IV.

**Dividends, When Declared on Corporate Stock and, Stock Rights, Are Not a "Deposit" Within the Meaning of Section 1475, Civil Code.**

In Section VI of his brief plaintiff seeks to avoid the application of Section 1475, Civil Code, by contending that dividends when declared and rights to subscribe to stock are "deposits" with the meaning of that term as used in Section 1475. The "deposits" expressly referred to in this section are those "regulated by the title on deposit." Title III of Division 3, Part IV (Secs. 1813 to 1881.3) is part of the code referred to. Reference to this Title clearly indicates that dividends and stock rights do not fall with the category of "deposits."

The sections of said code defining various types of deposits are as follows:

Sec. 1813. *Deposit, kinds of.* A deposit may be voluntary or involuntary; and for safekeeping or for exchange.

Sec. 1814. *Voluntary deposit, how made.* A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary.

Sec. 1815. *Involuntary deposit, how made.* An involuntary deposit is made:

1. By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner; or,

2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the

owner of personal property committing it, out of necessity, to the care of any persons.

Sec. 1817. *Deposit for keeping, what.* A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

Sec. 1818. *Deposit for exchange, what.* A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited.

Opposing counsel have been unable to produce any case holding that a dividend declared by a corporation is a deposit. They do not even indicate in their brief which of the various types of deposits defined in the code, they conceive defendant's obligation to be. Their argument seems to be that wherever a trust relationship exists there must be a "deposit." We find no authorities supporting this position.

## V.

### **The Facts Herein Do Not Warrant Modification of the General Rule That Interest on Dividends Accrues Only From Date of Demand.**

In Section VIII of his argument appellant contends blandly that any demand which he might have made for dividends or for issuance of stock rights would have been entirely fruitless and that, therefore, should he be entitled to recovery herein, he would be entitled to interest from the time the dividends were declared or the stock rights issued.

In connection with this matter, the trial court, in its Conclusion of Law IX [Tr. Rec. p. 62], found that plaintiff's cause of action asserted herein did not accrue until October 15, 1945, the date of his demand upon the defendant. With this conclusion plaintiff apparently agrees so far as the Statute of Limitations is concerned. In the accompanying Conclusion of Law XII [Tr. Rec. p. 63] the court holds that plaintiff would not be entitled to interest until that date. Certainly no interest should be allowed until the cause of action accrued.

Appellant points to no finding of the trial court that an earlier demand for payment of dividends or issuance of stock rights would have been disregarded, and in fact no such finding was made. On the other hand, it appears herein that defendant continued to pay dividends and issue stock rights to Mrs. Price *only* up to the date it received from plaintiff notice under date of March 20, 1944 [Tr. Rec. pp. 26-29]. It is to be noted that no question exists as to dividends declared after said date or any interest thereon.

Apparently, plaintiff concedes that in the absence of evidence of circumstances showing clearly that any demand would have been fruitless, the right to interest accrues only after such demand is made.

*Perkins v. Benguet Consolidated Mining Co.*, 55  
Cal. App. 2d 720 at 765, 132 P. 2d 70 at 99.

VI.

**Conclusion of Law XI [Tr. Rec. p. 62] Is Not in Error:**

1. In View of the Fact That There Is No Finding That Plaintiff Was a Minor at Any Time Defendant Rendered Performance to Plaintiff's Co-Tenant.
2. In View of the Fact That Plaintiff Has Rati-fied His Status as a Joint Tenant.
3. For the Reason That Section 1475, Civil Code, Applies as Against a Minor Joint Tenant.

In reply to Section IX of plaintiff's brief we desire to point out that it appears from the findings that plaintiff was 20 years old at the time 575 shares of defendant's common stock was issued to him and his co-joint tenants on November 20, 1928 [Finding XIV p. 45, XXII p. 54]. The dividends and stock rights here involved did not begin to accrue until some time in the year 1929 [Findings of Fact XI p. 43, XIX pp. 51 and 52, XXVIII p. 57]. Even if plaintiff was not 21 years of age the early part of 1929 he must at least have reached that age some time during the year 1929 and was not therefore a minor during a large portion of the period here involved. He clearly cannot escape the application of Section 1475 after reaching his majority.

Furthermore, even though plaintiff did not know of the conveyance of this stock to him as a joint tenant at the time it was thus conveyed when he was 20 years of age

[Finding XXIII pp. 54 and 55], it appears from the record that after attaining majority he ratified the conveyance of this stock to him as a joint tenant with two others both by his actions in making claims against his co-tenant Mr. Burton and by the bringing of the action now before this court.

In his cross-petition in the case of *Burton v. Hurley*, he based his claim against Burton on his status as a joint tenant [Tr. Rec. p. 71] and the court found in his favor on this theory [Tr. Rec. p. 87]. So far as his right is concerned to disaffirm the conveyance made to him as a co-joint tenant, it was either to repudiate entirely the conveyance or to accept it as made. Obviously he has followed the latter course and is now bound by that election.

The legal effect of ratification of an infant's contract "is the same as though there never was a power of avoidance—as though the agreement was absolutely binding from the beginning." (27 Am. Jur. 802, Sec. 73.) He is not at liberty to affirm a portion of a single transaction which he deems advantageous to him and disaffirm the rest.

*Peers v. McLaughlin*, 88 Cal. 294, 26 Pac. 119.

We submit therefore that having ratified the conveyance to him of this stock as a joint tenant after reaching majority, he is bound by all the rules of law applicable to joint tenancy; and these principles, in view of his ratification, apply with equal force to the period, if any, during which he was a minor as well as to subsequent periods after he had reached majority.

Plaintiff cites Section 33 of the California Civil Code to the effect that “a minor cannot give a delegation of power” in his attempt to prevent the application of Section 1475, Civil Code.

In *Ridley v. Young*, 64 Cal. App. 2d 503, 513, 149 P. 2d 76, the court in holding that Section 402 of the California Vehicle Code applied to both adults and minors, Section 33 Civil Code, notwithstanding, said:

“If the Legislature had intended to exclude minors from its application it would have been easy to have so stated.”

In so far as plaintiff’s co-tenants during his minority were trustees or agents for him under the theory announced in *Cober v. Connolly*, 20 Cal. 2d 741, such trusteeship or agency was not one created by a delegation of power given by a minor, but on the contrary was one created by law.

We will hereafter point out in subheading I of Division Two of our brief that Section 1475, Civil Code, applies to minor joint tenants as well as to adults.

DIVISION TWO.

APPELLEE'S SPECIFICATIONS OF ERRORS.

By its Conclusion of Law XII [Tr. Rec. p. 63] the trial court held that if Section 1475, Civil Code, were not applicable, plaintiff would be entitled to recover in this action. This ruling on the part of the court resulted from its conclusion that on the basis of its Findings of Fact the other defenses relied upon by defendant were not sound as a matter of law. However, if on the basis of the findings as made by the trial court, defendant as a matter of law was entitled to judgment, the judgment here appealed from must be affirmed. On this point, this court in *Town of South Tucson v. Tucson Gas, Electric Light & Power Co.*, 149 F. 2d 847(1), said:

“ . . . we are required to seek support of the judgment appealed from upon any ground disclosed in the record.”

Accord are:

*L. McBrine Co., Ltd. v. Silverman*, 121 F. 2d 181, 182(3);

*Elizabeth Arden Sales Corp. v. Blass Co.*, 150 F. 2d 988, 993(7.8), cert. denied 326 U. S. 773;

5 C. J. S. 1334, Sec. 1849.

I.

Conclusions of Law V, VI, VII and VIII [Tr. Rec. pp. 60-61] Are Erroneous Insofar as They Hold Plaintiff Entitled to Recover Dividends From Defendant Since the Dividend Orders Signed by Plaintiff Were Valid Until Cancelled.

II.

Conclusion of Law IX [Tr. Rec. p. 62] Is Erroneous in Holding That Plaintiff's Cause of Action Did Not Accrue Until October 15, 1945, and Was Therefore Not Barred by California Code of Civil Procedure, Section 337, Subdivision 1, or Section 339 Subdivision 1.

ARGUMENT.

I.

Conclusions of Law V, VI, VII and VIII [Tr. Rec. pp. 60-61] Are Erroneous Insofar as They Hold Plaintiff Entitled to Recover Dividends From Defendant Since the Dividend Orders Signed by Plaintiff Were Valid Until Cancelled.

The trial court found that plaintiff, not later than December 11, 1928, signed, at the age of twenty years, dividend orders directing defendant to pay all dividends on stock in which he held a joint tenancy interest to his co-tenant, Mrs. Price [Findings of Fact VI and VII, Tr. Rec. pp. 36-40], but held that these orders "were voidable . . . at the election of said minor within a reasonable time after reaching his majority" [Conclusion of Law V, Tr. Rec. p. 60] and that disaffirmance "was made within a reasonable time after reaching his majority" [Conclusion of Law VII, Tr. Rec. p. 61]. Finding of Fact XXIV [Tr. Rec. p. 55] shows this disaffirmance was made

March 20, 1944, after Mrs. Price's death and some time after all other matters on account of which plaintiff seeks a recovery herein had occurred. Conclusion of Law VIII is to the effect that plaintiff was entitled to receive one-third of all dividends up to the time of the death of Mrs. Price. Insofar as this is a holding that plaintiff was entitled to receive these dividends directly from defendant, it is in error.

Defendant's claim is that these dividend orders were valid until cancelled or disaffirmed and gave full protection to it in its dealings with Mrs. Price, and that no disaffirmance by plaintiff after Mrs. Price's death could have any retroactive effect.

On their face, these dividend orders are nothing more than directions given by joint obligees to their debtor as to how the debtor shall perform its obligations as such, directed to the debtor at "Los Angeles, California," and to be performed at Los Angeles. Section 1476 of the California Civil Code clearly applies to these orders. It reads as follows:

"Effect of directions by creditors. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance."

This section has been construed in *Cober v. Connolly*, 20 Cal. 2d 741, 128 P. 2d 519, wherein it is stated at page 744 as follows:

"Section 1476 was enacted in 1872, but has never been construed by an appellate court of this state. The wording of the section is identical with that of

section 702 of the Field Draft of the Civil Code of New York, enacted in 1865. The Code Commissioners of New York, in their ninth and final report, said of the provision: 'Thus, if the creditor directs money to be sent to him by mail, it is at his risk (*Graves v. Amer. Exch. Bank*, 17 N. Y. (205) 207; *Eyles v. Ellis*, 4 Bing. 112).' In a preliminary draft of the same code prepared by the code commissioners in 1862 and submitted for examination prior to revision, the section read: 'Payment is complete, and the debt extinguished, upon the debtor's making payment in the manner directed by the creditor, even though the thing paid should never reach the creditor.' The code commissioners based the wording of this section on the two cases cited in the annotation to the final draft of 1865. From this legislative history, it is apparent that the statute was directed to the manner of transmission and not to the payment of something other than originally bargained for by the parties to the agreement."

*Cober v. Connolly*, 20 Cal. 2d 741, 744, 128 P. 2d 519.

We submit these dividend orders are directions to defendant as "to the manner of transmission" of the payments of such dividends, and defendant's obligation to pay the dividends as directed is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance. An infant creditor over eighteen years of age whose claim is thus paid in full has no right of disaffirmance which would entitle him to be paid a second time (Cal. Civ. Code, Sec. 35), and has the same rights and obligations under Section 1476 of the Civil Code as any other creditor. Both of Sections 1475 and

1476 on common law principles apply to minors. A joint right barred as to adults is also barred as to minors.

*Sears v. Majors*, 104 Cal. App. 60, 62-63, 285 Pac. 321;

*Haro v. S. P. R. R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441;

*Gates v. Wendling Nathan Co.*, 27 Cal. App. 2d 307, 315, 81 P. 2d 173;

and payment to one of several joint obligees is payment to all even though some are minors.

*Bank of Guntersville v. U. S. Fidelity etc. Co.*, 201 Ala. 19, 75 So. 168.

The trial court held "the validity of the dividend orders is to be determined by the law of Missouri where plaintiff executed them." [Tr. Rec. p. 61.] Although it may be immaterial whether the law of California or that of Missouri controls as to this matter, we submit that the court's conclusion is in error. The dividend orders were delivered to defendant in California and called for performance there, and were acted upon by way of acceptance of these orders by defendant in that state. The orders related to stock in a California corporation, with its principal place of business in that state [Tr. Rec. p. 35]. Under these circumstances the following sections from Restatement, Conflict of Laws, and not those cited by the trial court, apply:

"Sec. 183. PARTICIPATION IN MANAGEMENT AND PROFITS.

The right of a shareholder to participate in the administration of the affairs of the corporation, in the division of profits and in the distribution of assets

on dissolution and his rights on the issuance of new shares are determined by the law of the state of incorporation.

“Sec. 355. PLACE OF PERFORMANCE.

The place of performance is the state where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed.

“Sec. 361. WHAT AMOUNTS TO PERFORMANCE.

The law of the place of performance determines the details of the manner of performing the duty imposed by the contract.

“Sec. 366. PERSON TO WHOM PERFORMANCE RENDERED.

The law of the place of performance of a contract determines the person to whom performance shall be rendered.”

Section 1646, Civil Code, is to the same effect.

The question of the competency of a minor stockholder to order payment of dividends accruing on his stock to be made to another person is fundamentally no different from his right to assign and transfer the stock itself. The only two cases we have found dealing with this question hold that the corporation issuing the stock held by a minor is fully protected in recognizing such an assignment made by the minor.

*Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671,  
31 A. L. R. 995;

*Carolina Telephone & Telegraph Co. v. Johnson*,  
168 F. 2d 489, 3 A. L. R. 2d 870.

The results reached in these two cases was provided for in California by Section 328e, Civil Code, which was added

to the code in 1931, effective August 14, 1931 (but now found with immaterial changes in Corporations Code as Section 2413). This section reads as follows:

“Neither a domestic corporation nor a foreign corporation keeping transfer books in this State shall be or become liable to a minor or incompetent person in whose name shares are of record on its books because of their transfer on its books at the instance of such minor or incompetent or the recognition of or dealing with such minor or incompetent as a shareholder whether or not such corporation shall have had notice, actual or constructive, of the nonage of such minor or of such incompetency.”

This section, of course, can have no application to any payments made by defendant in this case prior to the effective date of this new section in 1931. But we see no reason why it is not applicable to payments made after its effective date under a dividend order signed by a minor stockholder before the passage of this code amendment where, as here, the order is expressly continuous in its operation until countermanded. Such an order is the equivalent of a new and additional order given with respect to each and every new dividend as declared. Even if such orders were given by a minor prior to the effective date of this new code section, it is clear that the corporation would be protected in making payments after the effective date in accordance with the terms of the orders given by its minor stockholders. This situation is analogous to a continuing guaranty

which is in effect until revoked (Cal. Civ. Code, Secs. 2814 and 2815). Surely an infant who is a guarantor under such a continuing guaranty is under the necessity of revoking his guaranty if he is to escape liability on credits extended by the party to whom the guaranty is made after such infant reaches majority.

There are many cases holding that a debtor of a minor may, on order from the minor, pay the debt to a third person and that such payment discharges the debt to the minor. This question arises in connection with checks drawn by minors on bank accounts standing in their names and in cases where minors have endorsed negotiable or non-negotiable notes. Even in the absence of statutory provisions, a bank is protected in honoring a check drawn by an infant on an account standing in the infant's name.

*Smalley v. Central Trust & Savings Co.*, 72 Ind. App. 296, 125 N. E. 789;

*Phillips v. Savings Trust Co. of St. Louis*, 231 Mo. App. 1178, 85 S. W. 2d 923, 926;

*Hastings v. Dollarhide*, 24 Cal. 195;

*Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336;

10 C. J. S. 684;

43 C. J. S. 195.

At the bottom of page 63 of his brief plaintiff makes the contention that the dividend orders "are also held to be void *ab initio* under the law of Missouri." Although not elaborating on any theory on which the dividend

orders signed by plaintiff would be void, the authorities cited seemed to indicate that plaintiff's position is that these dividend orders were in the nature of a delegation of authority by a minor and as such are void for the reason that a minor cannot appoint an agent. This contention was made in the trial court, but the trial court held merely that the orders were voidable [Conclusion of Law V, Tr. Rec. p. 60].

As against this defendant, having no knowledge of fraud practiced on plaintiff, nothing should be read into these dividend orders that does not appear on their face or by necessary implication. We submit that on their face they are nothing more than an express indication made by the joint tenants that they desired defendant to make payment of dividends to one of their number in accordance with the provisions of Section 1475 of the Civil Code. These orders also, as we have heretofore pointed out, fall within the provisions of Section 1476 of the Civil Code. If they are to be construed as anything more than this, which we doubt, they are possibly in the nature of assignments. There are cases holding that orders of similar effect do operate as valid assignments:

*Wheatley v. Strobe*, 12 Cal. 92, 73 Am. D. 522;

*Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462;

*McErwen v. Johnson*, 7 Cal. 258;

*Donohue-Kelly Banking Co. v. Southern Pacific Co.*, 138 Cal. 183, 187 to 189, 71 Pac. 93;

*Title Insurance & Trust Co. v. Williamson*, 18 Cal. App. 324, 123 Pac. 245;

*Cannon v. Chapman*, 24 Cal. App. 2d 448, 75 P. 2d 522.

In the article on assignments in *Corpus Juris Secundum*, it is stated:

“The assignment of a fund may be in the form of an order on the debtor or holder thereof to pay the debt or fund of another person.”

6 C. J. S. 1097.

See also:

6 C. J. S. 1114, Sec. 61.

In order to construe these dividend orders [Tr. Rec. pp. 38 to 40] as an appointment of an agent, something must be read into the orders that is obviously not there and does not arise by necessary implication. There is nothing in the record to warrant the assumption that these dividend orders were intended by the plaintiff or by those who secured his signature thereon that the orders were intended to operate as an appointment of an agent.

On the basis of the theories above cited, we submit that these dividend orders given by plaintiff to defendant were not in the nature of an appointment of an agent by a minor and that they were valid, so far as this defendant was concerned, until they were cancelled, and that they are not, so far as this defendant is concerned, subject to any retroactive disaffirmance by plaintiff.

II.

**Conclusion of Law IX [Tr. Rec. p. 62] Is Erroneous in Holding That Plaintiff's Cause of Action Did Not Accrue Until October 15, 1945, and Was Therefore Not Barred by California Code of Civil Procedure, Section 337, Subdivision 1, or Section 339, Subdivision 1.**

In its answer herein, defendant set up as separate defenses the provisions of California Code of Civil Procedure, Section 339, subdivision 1, and Section 337, subdivision 1.

The first section referred to provides that any action upon an obligation not founded upon an instrument in writing must be commenced within two years while the second section provides that an action upon any obligation founded upon an instrument in writing must be commenced within four years.

As to a stockholder of record, it is the law in California that the resolution declaring the dividend is a writing and that consequently, the four year Statute of Limitation applies thereto. In the case of an action by a person not a stockholder of record, the two year Statute of Limitation would apply (*Perkins v. Benguet Consolidated Mining Co.*, 55 Cal. App. 2d 720 at 771, 132 P. 2d 70).

The court below held, in its Conclusion of Law IX, that neither limitation applied since his cause of action did not accrue until October 15, 1945, the date fixed as his demand for payment.

Section 352 of the California Code of Civil Procedure provides that when a cause of action accrues to a minor, the period of his minority is not a part of the time limited for the commencement of the action. In the case at bar,

as already pointed out, plaintiff attained his majority some time in the year 1929. Therefore, at least by the year 1930, the plaintiff was twenty-one years of age and was bound to disaffirm any actions taken by him while he was a minor within a reasonable time.

It has been held in numerous cases that such reasonable time may not exceed the period of the Statute of Limitations otherwise applicable to the case.

- Lanning v. Brown* (Ohio), 95 N. E. 921;  
*Urban v. Grimes*, 2 Grant Cas. (Pa.) 96;  
*Drake v. Ramsay*, 5 Ohio 252;  
*O'Donohue v. Smith*, 114 N. Y. Supp. 536;  
*Sternlieb v. Normandie* (N. Y.), 188 N. E. 726;  
*Chicago Telephone Co. v. Schultz*, 121 Ill. App. 573;  
*Blake v. Hollingsworth*, 76 S. E. 814;  
*Putall v. Walker*, 55 So. 844;  
*Mourant v. Pullman T. & S. Bank* (Ill.), 41 N. E. 2d 1007;  
*Wright v. Buchanan* (Ill.), 123 N. E. 53.

In the case last cited the court summarizes the rule as follows:

“In order to take advantage of minority in refusing to carry out a contract, the weight of authority is that the contract executed by the infant must be repudiated after the infant becomes of age within the Statute of Limitations.”

The fact that a claimant does not know of the existence of a cause of action in his favor, or the fact that the existence of such a cause of action has been concealed from him, does not suspend operation of the Statute of

Limitations unless the defendant sought to be charged is guilty of concealment (*Gibson v. Henley*, 131 Cal. 6, 63 Pac. 61, in which case the statute was held to run where the defendant did not know of his partner's fraud).

*Rose v. Dunk-Harbison Co.*, 7 Cal. App. 2d 502  
46 P. 2d 242.

Ignorance of cause of action does not toll statute.

*Bills v. Silver King, etc.*, 106 Cal. 9, 39 Pac. 43;  
*Aronson v. Bank of America*, 42 Cal. App. 2d 710,  
109 P. 2d 1001;

*Coy v. E. F. Hutton Co.*, 44 Cal. App. 2d 386,  
112 P. 2d 639.

It is the general rule that a fraudulent concealment of a cause of action must be attributable to the person sought to be charged in order to prevent the running of the statute.

2 Wood on Limitations (2nd Ed.), Sec. 276, p. 712;  
*Wood v. Williams*, 142 Ill. 269, 31 N. E. 681;  
*Wilson v. Williams* (Ill.), 33 N. E. 884.

In view of the finding in the court below that this defendant had no knowledge or reason to believe that any fraud had been practiced upon the plaintiff, we submit that the operation of the Statute of Limitations is not to be tolled or suspended. Plaintiff should be held bound to disaffirm any actions taken while he was a minor within a reasonable time thereafter which period of time must be the applicable Statute of Limitation. No concealment or fraud having been practiced by this defendant, plaintiff's cause of action must have been barred long prior to the commencement of this action on March 6, 1946.

### Conclusion.

The controlling question presented upon this appeal by plaintiff is whether the provisions of California Civil Code, Section 1475, apply. Plaintiff in effect concedes in his argument that said section would apply unless defendant had knowledge, actual or constructive, of the asserted fraud practiced upon him. The trial court below, upon all the evidence, expressly found that this defendant had no knowledge, or any reason to suspect, that a fraud was being practiced.

Therefore, the judgment should be affirmed.

Respectfully submitted,

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No. 12278.

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

---

LESTER W. HURLEY, APPELLANT,  
VS.  
SOUTHERN CALIFORNIA EDISON CO., LTD.,  
APPELLEE.

---

REPLY BRIEF ON BEHALF OF APPELLANT.

---

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FEB 20 1950

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APPELLEE.**

---

**REPLY BRIEF ON BEHALF OF APPELLANT.**

---

**DIVISION ONE.**

**I.**

**The defense of payment to Price on alleged valid assignments pleaded and litigated throughout the trial pre-supposed termination of joint tenancy and precluded reliance thereon.**

Appellee's claim that the defense of payment to one of several joint tenants was raised and litigated throughout the trial, finds no support in the record. The fact that such a defense, which now constitutes defendant's only defense, is not mentioned in defendant's answer or supplemental answer should be conclusive. It is true that plaintiff alleged that all stock in plaintiff's petition de-

scribed was issued to Lester Hurley, Elizabeth J. Price and George E. Burton, with full right of survivorship (T. R. p. 3); that 1/3 of all dividends and stock rights paid to Elizabeth J. Price were due and owing to plaintiff herein (T. R. p. 10).

However, no allegation appears in plaintiff's petition, or in defendant's answer or supplemental answer that the dividends or stock rights, for which this suit was brought, were issued to or payable to the plaintiff as a joint tenant of Price. On the contrary, plaintiff alleged that said dividends and stock rights were due and payable to the plaintiff.

Therefore, defendant's assertion that "plaintiff alleged his original tenancy interest, which defendant admitted" (Appellee's Brief, p. 4) discloses the complete absence of the defense and issue now relied upon. The allegation and admission by defendant of joint tenancy in stock could in no way raise the issue of joint tenancy in dividends and stock rights, or that the payment to Price of said dividends and stock rights constituted a payment to Price as a joint tenant of Hurley, who defendant "believed" had ceased to be a joint tenant.

If it had been the desire of the defendant to rely on the defense that the dividends and stock rights were due to Hurley as a joint tenant of Price, this allegation would of necessity appear affirmatively in defendant's answer. Further, the allegation "that defendant denies that said dividends and stock rights or either of them were or are owing to the plaintiff" (T. R. p. 22) would not have appeared. This allegation cannot be construed as an admission by defendant that it recognized the existence of any interest in Hurley, joint or otherwise.

The entire record, as well as the pleadings, disclose that it was not even intended by defendant to allege or rely on the defense that the dividends and stock rights were due and owing to Hurley as a joint tenant of Price. The entire defense was predicated on the theory that all payments were made to Price to the exclusion of Hurley for the reason that Hurley had assigned his entire interest

to Price, and his name as a stockholder had been removed from the books of the Company accordingly.

In support of this defense that Hurley had no interest—joint or otherwise—defendant brought forward the forged and void powers of attorney assigning said stock and void dividend orders to prove and justify defendant's exclusion of Hurley from any interest in all dividend and stock rights. When defendant was confronted with the fact that the dividend order and assignments embracing the power of attorney were void as attempted delegations of power by a minor, and further that said "documents" were forgeries, obtained by fraud and deceit, the defendant presented extensive expert testimony in an effort to prove the genuineness of the signatures to said powers of attorney, and attempted to establish the validity of the dividend orders.

That this was defendant's position and the defense relied upon stands admitted by appellee in its brief at page 6 thereof:

"The simple and admitted facts are that the defendant did make payments to one of several joint tenants believing that said joint tenant had, by properly executed documents, obtained the exclusive right to the payments and distribution made."

On this admission the question arises how defendant could believe it was making or intended to make payments to Hurley as a joint tenant of Price, when it believed Hurley had "by properly executed documents" parted with his entire interest and vested "the exclusive right to the payments" in Price, and that Hurley had therefore ceased to be a joint tenant?

Now under such an admission can it be doubted that defendant knew and intended that the payments so made to Price were made to the exclusion of Hurley, and were made without any expectation or thought that Hurley would share therein, or that Price in accepting said payments would "hold the proceeds as trustee or agent" for Hurley?

It follows that defendant is now in a position of asserting that it raised an issue and predicated its defense (now its only defense) on a state of facts that it "believed" did not exist, namely, that plaintiff remained a joint tenant with Price in the dividends and stock rights, although Hurley had "properly executed documents" that defendant "believed" conveyed all of Hurley's interest to Price.

Now aside from this absurd position now admitted by appellee, the pretrial stipulation entered in this case disproves defendant's present defense and constitutes a complete refutation and answer to the application of Section 1475 of the California Civil Code to this case.

The pretrial stipulation states that payments were made to Price (not as a joint tenant of Hurley) but "under Dividend Order No. 13157." This Dividend Order was not signed by Hurley, although if defendant considered Hurley a joint tenant, his signature would have been required (T. R. p. 26). This stipulation further provided that payments were made to Price "upon the authority of and in pursuance of Dividend Order 12743" (T. R. p. 27).

Certainly under such a stipulation defendant is estopped and cannot now be heard to say that payment was made to Price *not* "upon the authority of and in pursuance of Dividend Order 12743," and Dividend Order No. 13157, but that said payments were made to Price as a joint tenant of Hurley upon the authority of, and in pursuance of Section 1475, Civil Code.

Payment under Dividend Orders presupposes the non-existence of a joint tenant relation, while payment under Section 1475 of the Civil Code presupposes the existence of a joint tenant relation. Pleading the one defense, without more, precludes the other.

## II.

**The findings of the trial court establish that defendant had knowledge, both actual and constructive of fraud.**

In considering this point the court will note that the defendant relies exclusively on the trial court's Finding

XXVII (T. R. p. 57) wherein the court found defendant had no actual knowledge of the fraud perpetrated upon plaintiff by his grandmother.

This finding which is in the nature of a negative conclusion of fact must be considered in connection with all other findings made by the court touching fraud. It will be further remembered that this finding is specifically limited in two respects. First, to actual knowledge of the fraud perpetrated by the grandmother which, as the findings show, was not the only fraud involved. Second, it in no manner covers constructive knowledge of fraud.

### **Actual Knowledge of Fraud.**

The record shows specific findings of fact which establish actual knowledge of fraud on the part of the defendant, and these specific findings of fact cannot be nullified or eliminated by a conclusion of fact that no knowledge existed.

We direct the court's attention to the following findings:

1. Alteration of powers of attorney purportedly executed to assign the 575 shares of stock, which alteration was made after "documents" were executed by the plaintiff and said alteration was at the defendant's suggestion (Finding IX, T. R. pp. 41, 42). The defendant transferred plaintiff's stock upon authority of these altered assignments. This was action by the defendant on "documents," which defendant knew had been so altered as to render them void. These documents so altered with defendant's knowledge were part of the means used by plaintiff's grandmother to perpetrate the fraud against the plaintiff.
2. All stock certificates were issued in the name of Lester Hurley (Findings III, IV, T. R. p. 36). Powers of attorney purporting to assign said stock were executed by Lester W. Hurley (T. R. pp. 26, 58). These assignments were *not properly endorsed as-*

*signments* of which fact the defendant had actual knowledge, as it had all the record before it. This fact was found by the Kansas Court and by the lower court Finding XVI, Exhibit "D" incorporated by reference (T. R. pp. 49, 87). To transfer plaintiff's stock on defendant's books on improperly endorsed assignments was a fraud on the plaintiff, and a violation of the duty defendant owed the plaintiff.

3. The defendant was fully aware, and had direct knowledge of the great reluctance on the part of plaintiff's grandmother to furnish a guarantee of Hurley's signature on these assignments, and the repeated effort made to secure the transfer of said stock without such a guarantee (Finding IX, T. R. p. 41). This involves a specific finding of fact that shows direct knowledge on the part of defendant of action by Price that was part and parcel of the fraud committed.
4. The record shows that defendant had knowledge of, and was fully aware that plaintiff was being excluded from any benefit in the dividends and stock rights when it made payment to Price. This constituted actual knowledge of the fraud of exclusion perpetrated by Price against the plaintiff.
5. In Finding of Fact XXVIII (T. R. p. 57) it is specifically established that the defendant's resolutions passed January 25, 1929, before any stock rights were delivered to Elizabeth J. Price required that all stock rights be represented by warrants issued in the name of the stock holders (which included Hurley) "assignable by endorsement and delivery."

No warrants were issued that included plaintiff's name, and no warrants were delivered to him or endorsed and delivered by him. Since defendant admits that said dividends were paid and said stock rights delivered, upon the authority of, and in pursuance of Dividend Orders 12743 and 13157, it follows that they could not have been

delivered in pursuance of, or upon the authority of, endorsed warrants, as required by said resolution.

This action of the defendant was a violation of defendant's own resolution, and a fraud on the plaintiff, as well as a flagrant violation of his rights, of which defendant not only had actual knowledge, but which was perpetrated by the defendant outside of, above, and beyond the fraud of Elizabeth J. Price, herself.

We submit that this action alone eliminates any possible application of Section 1475 of the Civil Code. Further, that these specific findings of fact completely nullifies the negative conclusion of fact stated in Finding XXVII (T. R. p. 57).

### **Constructive Knowledge.**

It stands established by the findings and judgment in the Kansas case, as well as in this case, that the purported signatures of Lester W. Hurley appearing on the powers of attorney assigning said 575 shares of stock are forgeries (Finding XVI, Exhibit "D," and XVII, T. R. pp. 49, 50, 58, 87). This judgment is final, as no cross appeal has been taken from the trial court's decision on this point.

It shows that the transfer of said shares out of plaintiff's name and the subsequent payment of all dividends and stock rights to Price was based on forgeries in the hands of the defendant. Further, that the law charges the defendant with the inescapable duty to *know* whether such assignments are genuine or spurious and no amount of good faith will relieve it from that duty.

Here again, the defendant has been unable or unwilling to meet this issue, but has disregarded all authorities cited on the point in Appellant's Brief (pp. 40-48). Defendant again relies on Finding XXVII, which defendant attempts to construe as a finding of no actual or constructive knowledge of fraud. This conclusion of fact shows on its face that it is specifically limited to actual knowledge of fraud perpetrated by Price against plaintiff.

However, on the question of constructive knowledge of fraud, since it is an established fact that said instru-

ments were forgeries, and were acted upon by defendant, Conclusion of Fact XXVII cannot eliminate the effect thereof. The law is definitely settled that a corporation is bound to know the signatures of its stockholders. It is bound to know a spurious signature when presented to it for the purpose of securing a transfer of stock. Although a corporation cannot always have actual knowledge of the genuineness of a signature on assignments, nevertheless it is charged with knowledge as to the nature of said signature on stock assignments, regardless of innocence, mistake or lack of actual knowledge, and it is for this reason that such signatures are always required to be guaranteed for its own protection.

It follows that the forgeries gave notice and constructive knowledge of fraud to defendant *ab initio*, and the Conclusion of Fact XXVII, no matter how construed, constitutes no answer to the forgery found and the law applicable thereto.

Finding of Fact XIV (T. R. p. 45) Stipulation, Paragraph 5 (T. R. p. 29), Finding XXVI (T. R. p. 56), established that plaintiff was a minor at the time of purported powers of attorney and Dividend Orders were executed by him. Plaintiff was born December 18, 1908, and was therefore 19 years of age when the Dividend Orders were received by the company on December 11, 1928. He was 20 years of age when the forged powers of attorney of assignment were executed, in January of 1929 (Finding IX, T. R. p. 41).

The procural of these documents by Price from this minor plaintiff constituted a fraud upon him. These "documents" and all of them were void as an attempted delegation of power, both under the California law and the Missouri law as established by authorities cited in Appellant's Brief, page 63.

In the first Findings of Fact entered by the trial court, the court found "Dividend Orders Nos. 12742 and 12743 constituted attempted delegations of power by minor, which are declared void by statute of California. Such actions of minor are also held void *ab initio* under the law

of Missouri." The present Conclusion of Law V (T. R. p. 60) holds said orders to be voidable.

However, since plaintiff was a minor, 19 years of age, when the Dividend Orders were executed, and said instruments were at least avoidable, and therefore subject to disaffirmance within a reasonable time after plaintiff reached his majority, they were ineffective to bind the plaintiff, and constituted a fraud against the plaintiff. To protect the minor from such fraud, avoidance by the minor is always permitted.

Now since defendant was bound under the law to know plaintiff was a minor, at the time said instruments were executed, it had constructive knowledge of the fact that the property rights of the minor plaintiff were being illegally affected, violated, and a fraud worked upon him by the use of these illegal and void instruments. *Williams v. Leon T. Shettler Co.*, 98 Calif. App. 282, 276 Pac. 1065; *Lee v. Hibernia Savings Society*, 177 Calif. 656, 171 Pac. 677.

This constructive knowledge of the illegality with which the defendant was charged as a matter of law in dealing with this minor could never be wiped out or nullified, regardless of the rules relative to disaffirmance. On the question of knowledge of fraud, all questions concerning disaffirmance are immaterial. The knowledge thus secured by the defendant as to the attempted perpetration of fraud on this minor would continue and be binding upon defendant at all times thereafter.

In fact, the Section 2413 of the Corporation Code of California referred to by defendant as having been adopted in 1931, after defendant became charged with knowledge of illegality and fraud involved in the instruments under which it purported to act, could in no manner relieve the defendant of the knowledge of fraud previously acquired. In fact, this section of the statute indicates an attempt to modify the previous existing rule that a corporation was constructively bound and charged with knowledge of fraud tainting instruments executed by a minor.

It follows that by reason of the minority of the plaintiff in 1928 and 1929, when all of these instruments were

executed, and acted upon by the defendant, the defendant became charged as a matter of law with knowledge as to the fraud involved therein, and nothing that thereafter occurred could wipe out said knowledge so as to enable the defendant to say that it made payment to one of several joint tenants without knowledge, actual or constructive of the fraud perpetrated by Price against said minor plaintiff. Further, it cannot be heard to say that it had no knowledge of the fraud perpetrated against the minor plaintiff by the violation of its own resolutions.

### III.

**Dividends and stock rights when declared and set aside are severed and constitute a trust fund held by the company for the benefit of each stockholder as an individual.**

Defendant while admitting that dividends on stock exist separate and apart from the stock, and that stockholders rights therein are "distinct from their rights as stockholders" makes the inconsistent statement that such rights are still governed and controlled by their rights as stockholders.

To support this position, reliance is placed on *Estate of Zaring*, 93 A. C. A. 717, 209 Pac. 2d 642. In this case the proceeds of the sale of the corpus of the joint tenancy property is held to retain its joint tenancy status. What has been said in Appellant's Brief at page 34, relative to the case of *Fish v. Security First National Bank*, 31 Calif. 2d 378, 89 Pac. 2d 10, applies to cases cited by appellee under this point.

Further, in the Zaring case, rent had been collected on real property by the guardian, and had become a part of the corpus of the fund held by him for the joint tenants. It was held that the right of survivorship existed, and the entire fund passed to the surviving tenant. This case in no manner touches the question that dividends declared, and set aside, will pass by survivorship to the surviving joint tenant.

The defendant points out that rent due on property does not pass to the purchaser of the property. This is

true. It is also true that all rent due and unpaid on property held in joint tenancy does not pass to the surviving joint tenant. Certainly there is nothing in the Zaring case to indicate that due and unpaid rental on property held in joint tenancy passes by survivorship.

However, regardless of how rents on joint tenancy property may be treated, no case has been cited that holds that the right of survivorship attaches to dividends declared, and not paid prior to the death of the joint tenant. Can it be conceived that the right of survivorship, which must always exist in a joint tenancy, can pass to the survivor of jointly owned stock, the declared but unpaid dividends, when the sale of the stock by its owner cannot and does not do so?

#### IV.

**The dividends and stock rights when set aside constituted a special deposit in the hands of defendant for the benefit of the plaintiff.**

The nature of the deposit within which the fund in question falls is clearly indicated as being a "special deposit," both by the authorities and statutes cited at pages 52 to 58 of Appellant's Brief.

No authorities to the contrary are cited by defendant. That the fund in question was a payment to the corporation for the use of the stockholder brings it within the meaning of a special deposit, as defined and analyzed by said authorities.

#### V.

**Plaintiff is entitled to interest from the date each dividend was declared, and not from the date of demand.**

Defendant has at all times up to and including the present time denied "that said dividends or stock rights or either of them were or are owing to the plaintiff" (T. R. p. 22). Even after plaintiff's ownership was established in the Kansas case, defendant's position remained unaltered. The demand for payment on October 15, 1945, was

rejected. Can it be conceived that an earlier demand by plaintiff for payment of dividends on stock that defendant had transferred on its books to another under the "belief" that plaintiff had "by properly executed documents" vested the other with "exclusive right to payment" would have resulted in compliance with such a demand?

The futility and impossibility of an earlier demand is shown, by the record, in this case in a manner that is unique. It would be extremely difficult, if not impossible to duplicate it, or state a set of facts which would indicate more conclusively the futility of making an earlier demand than is established in this case.

In this connection defendant points to the fact that dividends were paid to Mrs. Price only up to March 20, 1944 (Appellee's Brief, p. 22). This is not correct. Payments were made to Price up to December 27, 1943, the date of her death (T. R. pp. 45, 53). Immediately following the death of Mrs. Price, George E. Burton, her son, claimed the entire ownership of the 575 shares of stock. It was then that plaintiff learned for the first time of the fraud that had been perpetrated against him by his grandmother and her son, and litigation promptly resulted between Burton and Hurley.

## VI.

### **Conclusion of Law XI (T. R. p. 62) is erroneous.**

1. The record clearly discloses that payments were made to Price during plaintiff's minority.
2. Validity of the forged powers of attorney and dividend orders, and not ratification of joint tenancy in the stock certificates, is involved herein.
3. Calif. Civil Code, Sec. 33, prevents Section 1475 of the Civil Code from applying against a minor.

The plaintiff was born December 18, 1908. Plaintiff was therefore 20 years of age in January, 1929, when the forged forms of assignment, including powers of attorney, were received by defendant in Los Angeles on January 22,

1929. Plaintiff was 19 years of age when the void dividend orders were received by defendant on December 11, 1928, Finding VI (T. R. p. 37).

Dividends on stock in defendant company were paid quarterly (T. R. p. 43). Payment on said dividend orders was begun December 11, 1928, and continued to December 27, 1943, Finding XX (T. R. pp. 53, 45). Stock rights represented by warrants issued in the name of the stockholder were created by resolution January 25, 1929, to be delivered "on or before April 22, 1929." Finding XXVIII (T. R. p. 57).

It thus clearly appears that payment of dividends and delivery of stock rights under the void assignments and dividend orders were made to Price during the minority of plaintiff. The fact that plaintiff reached his majority December 18, 1929, can be of no importance as far as the question here involved is concerned.

The fact that plaintiff was a minor at the time the void assignments and dividend orders were secured and acted upon, both as to dividends and the delivery of warrants constituted a fraud upon plaintiff. Since defendant was bound to know under the California law that plaintiff was a minor at the time it received and acted upon said void documents, it was charged with knowledge of the fraud so perpetrated.

It is likewise true that this knowledge would be charged to the defendant, regardless of whether the documents were void or merely voidable. To act under them in either event would be to act with knowledge of their illegality and with an understanding that they were subject to disaffirmance, which did occur within a reasonable time after plaintiff reached his majority (T. R. p. 47).

It is therefore unimportant as to whether or not all payments by and under which plaintiff was defrauded occurred during his minority, or afterwards, as it is not the time when payments were made on the void documents that renders Section 1475 of the Civil Code inapplicable, and removed defendant from all protection of said statute, but it is the knowledge of the fraud perpetrated against

the minor plaintiff that destroys the application of Section 1475.

The knowledge of the illegality with which "documents" were tainted because of plaintiff's minority would not evaporate, be wiped out, or cease to exist, when plaintiff became of age. The knowledge with which defendant was charged as to plaintiff's minority, which prevented Section 1475 from operating prior to the day plaintiff reached 21, would be just as effective to prevent exoneration and protection of the defendant under Section 1475 afterwards, as it was before. The exoneration under Section 1475, on which defendant now relies, could exist in no event unless defendant acted without knowledge, actual or constructive, of the perpetration of fraud against the plaintiff. Since plaintiff was charged with knowledge of the illegality and fraud being perpetrated at the time the void documents were received, and payments made, this knowledge would of necessity remain and continue throughout the entire transaction.

There is not now, and there has never been an issue in this case as to the form of ownership of the shares of stock, as defendant attempts to indicate. The form of ownership of the stock which is not involved herein, and the ownership of the dividends and stock rights are separate and distinct. There is no question in the case as to the ratification of the dividend orders and the forged assignments by which an attempt was made to transfer the dividends and stock rights to Price. The record discloses that no action of ratification pertaining to the void "documents" occurred, but that all action was directed toward disaffirmance.

The attempt to distinguish the case of *Perkins v. Benquet Consolidated Mining Co.*, 55 Cal. App. 2d 720, 132 Pac. 2d 70, on the ground that in the case at bar, defendant was without knowledge of Price's claim, is without merit. Defendant knew as a matter of law when the forged and spurious powers of attorney were presented to it for action, that an effort was being made by Price to eliminate all plaintiff's interest illegally. Price was acting under illegal

“documents” as defendant well knew by reason of plaintiff’s minority.

Defendant’s effort to avoid the finding of the lower court that the Kansas judgment was *res judicata* ignores the fact that such finding and judgment is conclusive, as no cross appeal was taken therefrom. In this connection defendant has also overlooked or disregarded the fact that the trial court found specifically all the fraud, deceit, concealment, misrepresentation, lack of consideration, and minority of the plaintiff, that was found by the Kansas court. These findings as effectively invalidate the “documents” as those made in the Kansas court, and constitute a confirmation thereof.

It clearly follows that the same result should flow from these findings in this court as flowed from them in the Kansas court, namely, “the entire transaction was so tainted with deception practiced upon the defendant (Hurley) by his grandmother and his uncle, that the transfer of the 575 shares of stock cannot be approved by the court, and thus become effective” (T. R. p. 8).

The court will also note that the lower court in addition to finding the Kansas judgment *res adjudicata* (T. R. p. 58), also found said assignments of the 575 shares to be forgeries and “not properly indorsed.” Finding XVI (T. R. p. 49, Exhibit D, incorporated by reference, page 87). It follows that *res judicata* has become a moot question. However the conclusion of the trial court is well supported by the authorities.

The cases cited by defendant under this point dealing with actions barred by statutes of limitations have such a remote relation to the point involved herein that analyzation is considered unwarranted.

**DIVISION TWO.**

## I.

**Conclusions of Law V, VI, VII, VIII and IX are correct.**

The separation of defendant's brief into two divisions is significant. In the first division defendant attempts to establish its latest defense, namely, that it discharge its obligation to Hurley by payment to Price as a joint tenant of Hurley. In the second division it reverts to its pleaded defense, namely, that Price was the entire owner of the fund in question by reason of valid and binding assignments and dividend orders that made Price the successor to Hurley's entire interest.

It follows that if the position taken in Division Two is correct, then at no time involved herein was plaintiff a joint tenant of Price in the dividends and stock rights. If on the other hand the position taken in Division One is correct, then none of the "documents" relied on in Division Two were valid and binding on plaintiff.

It is also significant that in Division Two defendant departs from the position taken in Division One (Appellee's Brief, p. 6) that the findings of the trial court are conclusive since the transcript of the evidence is not before the court. It urges, nevertheless, that the trial court erred in finding that plaintiff was entitled to 1/3 of dividends and stock rights (Findings XIII and XXII, T. R. pp. 45, 54) and that plaintiff disaffirmed the dividend order and assignments within a reasonable time. Finding of Fact XXVI (T. R. p. 56). This is the second court that has so found (T. R. p. 88).

Plaintiff had a reasonable time after reaching his majority to disaffirm. As decided in *Ralph v. Ball*, 100 Kan. 460, "reasonable time is one of fact." The time has been

fixed by statute "not by counted years but reasonableness under all the circumstances."

It has been pointed out above that Dividend Order No. 12743 was an attempted delegation of power by a minor void under Section 33 of the California Civil Code, and needed no disaffirmance. This order shows on its face that its object and purpose was to confer power on the defendant to make payment to a party not otherwise authorized to receive payment, and was subject to revocation by the plaintiff at any time. It would be a strange contract or assignment that would be subject to instant cancellation or repudiation. This order shows that it had nothing to do with "manner of transmission," as defendant suggests.

The case of *Haynes v. Thomas G. Slack*, 32 Miss. 193, is directly in point. In this case Thos. G. Slack was a minor of the age of 20 years, and entitled to his distributive share of his father's estate. The estate was sold, and the money ordered distributed among the heirs. Thos. G. Slack assigned his share in the estate to one Arrington, but payment of the fund to Arrington was denied. The court held:

"The heir must have legal capacity to execute the proper acquittance to the administrator before he can insist upon payment of his share of the money. Thos. G. Slack having no power to execute an acquittance, which would bind him, could not by the transfer invest his assignee Arrington with such power."

*Swanburg v. Fossen*, 43 L. R. A. 427, 433; 43 C. J. S., p. 130, Sec. 53; *Fuqua v. Sholem*, 60 Ill. App. 140; 31 C. J. 1002. The record discloses that Dividend Order 12743 is not only void as a delegation of power, but has now twice been found illegal and void by *reason* of fraud and deceit practiced in its procurement. Finding XIV (T. R. pp. 46-47), Conclusion VII (T. R. p. 61).

It will be noted that the defendant has failed to point out whether the "assignments and irrevocable powers of attorney" under which plaintiff's stock was transferred on defendant's books, constituted attempted delegation of power or not (T. R. p. 89).

In this connection it will likewise be noted that only a small part of the funds involved herein are claimed to have been paid by defendant under Dividend Order 12743. Finding XX (p. 53). All other payments were made under Dividend Order 13157, which was not signed by plaintiff. Finding XII (T. R. p. 45). The defendant has failed to disclose under what authority from the plaintiff defendant claims to have made the payments under Dividend Order 13157.

The case of *Bank of Guntersville v. U. S. Fidelity, etc., Co.*, 201 Ala. 19, 75 So. 168, is cited as holding that payment to one of several joint obligees is payment to all, though some are minors.

This case did not involve payment to a minor, as payment was made to the minor's guardian. The language used is clearly *obiter dictum*. Further there is no showing in the case that such a statute as Section 33, California Civil Code, exists in Alabama. The facts indicate also that no "void documents" executed by a minor were involved. Thus no knowledge of the illegality and fraud that was being perpetrated against the minor could be charged against the obligor as in the case at bar, which, in and of itself, eliminates the exoneration claimed under Section 1475 of the Civil Code.

Now as to the statute of limitations, the law is well settled, that concealment of facts on which the cause of action is based, stops the running of the statute of limitations. In the case at bar knowledge of the fraud involved, both actual and constructive, on the part of the defend-

ant has been specifically found by the trial court, as well as actual concealment of information, provided and required to be given to the plaintiff by defendant on resolutions and otherwise. Finding of Fact XXVIII (T. R. p. 57), Finding XVI (T. R. p. 49 and Exhibit D, p. 87).

On the record the statute of limitations can have no application, as shown by the authorities.

*Hansen v. Bear Film Co.*, 28 A. C. 173, 1. c. 197.

*Calistoga Nat'l v. Calistoga Vineyard*, 7 Cal. App. 2d 65, 72, 46 Pac. 2d 246.

*Wells v. Green Bay Co.*, 90 Wisc. 1. c. 453.

*Miles v. Bank of America, etc.*, 17 Cal. App. 2d 397-8, 62 Pac. 2d 177.

*McDermot v. Hays*, 175 Cal. 95, 114, 118, 70 Pac. 616.

*Neff v. New York Life Ins. Co.*, (April 26, 1946)  
74 A. C. A. 208, 215.

### CONCLUSION.

Defendant seems to concede that the controlling question on this appeal is the applicability of Section 1475 of the California Civil Code. This position harmonizes with the finding by the lower court that if Section 1475, Civil Code, is not applicable, plaintiff is entitled to judgment. Conclusion XII (T. R. p. 63).

Therefore, judgment for the plaintiff logically follows since the inapplicability of Section 1475, Civil Code is established by the specific findings of the lower court that charged defendant with knowledge, actual or constructive, of the fraud perpetrated against the minor plaintiff which includes action by defendant on altered "assignments and irrevocable powers of attorney"; forgery; action on assignments not properly indorsed; dividend orders procured by fraud and deceit that were void

as attempted delegations of power by a minor; violation of defendant's own resolutions in failing to issue and deliver stock warrants to plaintiff, and the fraud of excluding plaintiff from all benefits with full knowledge of the intended exclusion.

Further, since Section 1475, Civil Code, was not pleaded as a defense, and the dividends involved were never held in joint tenancy, but constituted a special deposit within the meaning of Section 1475, Civil Code and Section 33 of the Civil Code prevents Section 1475 applying to minors, plaintiff is entitled to recover all dividends and stock rights, with interest thereon from date each dividend was declared, and set aside for payment.

Respectfully submitted,

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No. 12278

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

LESTER V. HURLEY,

*Appellant,*

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,

*Appellee.*

---

## PETITION FOR REHEARING.

---

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## PETITION FOR REHEARING.

---

SOUTHERN CALIFORNIA EDISON COMPANY, defendant and appellee in the above entitled proceeding, hereby petitions the above entitled court that it grant a rehearing to said appellee as to matters decided adversely to it by this court's decision herein of May 25, 1950, and on the grounds more particularly hereinafter set out. Counsel for appellee hereby certify that in their judgment this petition is well founded and that it is not interposed for delay.

I.

**The Findings of the Trial Court That Defendant Had No Actual Knowledge Nor Reason to Believe That Any Fraud Had Been Perpetrated on Plaintiff, Makes Section 1475 Civil Code Applicable, Even Though the Purported Signatures of Plaintiff on Stock Assignments Were Forgeries.**

If we understand correctly the effect of this court's decision herein, it is that even though defendant had no knowledge nor reason to know of any fraud practiced upon plaintiff, nevertheless the payment of dividends upon stock owned by plaintiff as one of three joint tenants to another of the co-tenants, does not discharge defendant's obligation, so far as plaintiff is concerned. This result is based upon the assumption that the stock certificates evidencing plaintiff's ownership of this stock had been presented to the defendant for transfer to the other two joint tenants with forged signatures of plaintiff thereon.

If a stockholder's certificate is transferred by the corporation on a forged signature, he has the choice of two remedies against the corporation. He may either bring an action against the corporation for damages for conversion or an action to compel the corporation to replace the shares in his name. The corporation's liability is not based upon any negligence or bad faith in failing to recognize the forgery. Questions of good or bad faith are immaterial. (Fletcher Cyclopaedia Corporations, Vol. 12, pp. 455 and 500.) It follows that in event of a forgery, it is not correct to state that the corporation is liable because it is charged with knowledge of the forgery. It is liable because in the absence of a genuine signature, the stockholder has not authorized any transfer.

But plaintiff has not brought any action for conversion, and even if he had, he would have found it barred by Statute of Limitations. (*Wright v. Ward*, 65 Cal. 525, 4 Pac. 534; *First Nat. Bank v. Thompson*, 60 Cal. 2d 79, 140 P. 2d 75.) He could have taken the position that the issuance of new certificates on forged signatures destroyed the joint tenancy. But it was to his advantage to take the position that he was at all times a joint tenant of the stock in question. By taking this position he was benefited as a result of the subsequent death of one of his joint tenants, and, as a result became the owner of one-half of this stock.

Both in this action and in his earlier action against his co-tenant Hurley, plaintiff has sought to maintain this position as a joint tenant. At no time has he made any claim of wrongful conversion of his stock. He must not be allowed to confuse the different types of relief to which he might be entitled. In maintaining his position as a joint tenant of the stock in question, his rights as such tenant and the obligations of defendant to him are no different, because of the fact he might have brought an action for conversion. In spite of the presence of his forged signatures, assuming they were in fact forged, and the issuance of new certificates to the other two joint tenants, the plaintiff continued to be a joint tenant in this stock, so far as all parties involved were concerned.

In this action plaintiff is suing only on a debt arising from dividends he claims were due him as a stockholder. As is pointed out in both the brief of appellant (pp. 24-26) and that of appellee (p. 18) herein, dividends when declared become a debt due from the corporation to the stockholders, the act of declaring a dividend operating as

an actual severance of the dividend from the stock. In this action on a debt due joint tenants, as distinguished from one for conversion of his stock interest as a joint tenant, the good faith of defendant, as an issue of fact, is a most important issue. In view of the position plaintiff has taken, "the great principle that no one can be deprived of his property without his assent," is not here involved. His property interest as one of three joint tenants to whom a debt is due from defendant is as a matter of law subject to the provisions of section 1475 Civil Code.

This court's decision states "the Company was under a continuing duty to treat Hurley as a stockholder," but it does not indicate any particular in which defendant failed to do so. Defendant regularly paid the dividends on the very stock thus owned by plaintiff to one of his co-tenants without having knowledge or reason to know of any fraud. In so far as can be determined from the record herein, neither Hurley nor defendant did anything or failed to do anything differently than would have been done if these new certificates had not been issued.

In the decision herein it is stated that "The Company must have known from the circumstances that no portion of these sums would ever reach Hurley." There is surely no presumption that Hurley's co-joint tenant and his statutory trustee to whom these dividends were paid, would not make a proper accounting. The statutory presumption is to the contrary. (Section 1963(1) Civil Code.) The issuance of the new certificates did not relieve her of that duty. The presence of any actual knowledge or reason to know on the part of defendant that such accounting would not be made is negatived by the express findings of the trial court. Even the presence of forged signatures

does not of itself impart knowledge or reason to know they are in fact forged, and their presence, assuming again they were forged, did not do so as is shown by the trial court's findings.

In so far as the presence of a forged signature is concerned, we submit that there is no material difference, in the situation here presented, than would be involved in the case of a check payable to two payees jointly, which is presented for payment by one payee, duly indorsed by him, but with the signature of the other payee forged. In such a case, if the presence of the forged signature were to constitute notice, actual or constructive, of fraud upon the payee whose signature is forged, payment to the other joint payee should not discharge the obligation to the payee whose signature is forged. The case of *Dewey v. Metropolitan Life Ins. Co.*, 256 Mass. 281, 152 N. E. 82, presents this problem, and it there held that the obligation is discharged under these circumstances. In that case, the Plaintiff, whose signature, by mark, was forged, failed to recover after the check was cashed by Ryan, the other joint payee. The court, after referring to the same rule of common law, which is codified by section 1475 Civil Code, stated "that the contractual rights against the insurance company, which were created by the delivery of the check to the authorized agent of Plaintiff, were extinguished on delivery of the check to the bank, when it cashed it without notice of any limitation on the right of Ryan to receive the proceeds of it." If the presence of a forged signature of one joint tenant payee of a check gave no notice that the other payee would not account to his co-payee, neither in the case at bar did defendant have any notice that a proper accounting would not be made.

In applying the common law exception to section 1475, Civil Code, as set out in section 131 (2) Restatement of Contracts, it is actual knowledge of fraud or reason to know of fraud as a matter of fact, that is the material element. We are not here dealing with any kind of theoretical knowledge which is chargeable to one as a matter of law. The issue is purely one of fact, and the trial court decided that issue in Defendant's favor after having granted a new trial *specifically for the purpose of trying the issue of* "whether or not Defendant knew or had reason to know of the fraud perpetrated upon Plaintiff by Plaintiff's co-tenant, Elizabeth J. Price" [Tr. Rec. p. 34]. In the absence of the testimony before the trial court, we are at a loss to know how, on this appeal, this finding of fact can be disregarded.

Reference is made in the court's decision to the "illustration" given of the application of section 131 Restatement Contracts as tending to justify the result reached by the court in its decision. We submit that a careful analysis of the provisions of this "illustration" does not support such conclusion. It is apparent from the facts there stated that D actually knew that A had no right as against B and C to release the claim against D except upon the receipt of *money*. It was only upon the receipt of *money*, as called for by the nature of the obligation, that A could make the division agreed to by A, B and C, and D had actual knowledge of this fact. A, after the discharge of the debt due him individually from D, had nothing from such a settlement to share equally with B and C. Such a settlement was fraudulent as against B and C, and D knew it was.

This illustration is not analogous to the facts in the case at bar, as several vital facts present in the illustration are missing in the case at bar. Defendant had no

knowledge of any agreement between the joint tenants as to what, if any, division was to be made between them of the dividends due from Defendant. Defendant's obligations were performed by cash payment and not by cancellation of any claims it might have against one of the joint tenants. Defendant had the best of all reasons for believing it was agreeable to Hurley to continue payments to Mrs. Price, namely written instructions over Hurley's signature to do so. In the absence of actual knowledge on the part of defendant or reason to know of fraud against Hurley, Defendant had no reason to know Mrs. Price would not account to him on the basis of what he was entitled to receive out of the *money* paid her. The fact that Hurley no longer appeared as one of the joint tenant owners of the stock on the defendant's books afforded no information to Defendant that the other joint tenants claimed ownership therein to the entire exclusion of Plaintiff. It is a matter of common knowledge that corporate stock frequently stands of record on the books of the issuing corporation in the names of others than the beneficial owners. This court should here take judicial knowledge of this practice in connection with the bearing it has on the finding of the trial court that Defendant had no knowledge or reason to know of fraud.

The cases of *Weir Plow Co. v. Evans* (Tex. Civ. App.), 24 S. W. 38; *Lemiette v. Starr*, 66 Mich. 539, 33 N. W. 832; *Remington v. Eastern Ry. Co.*, 109 Wis. 154, 85 N. W. 321, and *Rooks v. Satuland*, 33 Ga. App. 8, 124 S. E. 904 are cited by the court in support of its ruling. In the *Weir Plow Co.* case, the court held proper a jury instruction that either member of a partnership has the right to settle, compromise and release claims due the firm, unless they further find the release was executed without consideration accruing to the partnership, or that the part-

ner executing the release “was induced, in whole or in part, to sign said release by reason of a private benefit and gain accruing to him alone, and not to the benefit of “the partnership,” and that such facts were known to the Defendant (in whose favor the purported release ran) at the time it procured said release.”

In the *Lemiette* case the suit was on an obligation due two partners. Defendant urged as a defense a note in favor solely of Lemiette, one of the partners, given by Defendant in payment of the partnership claim on the assurance of Lemiette that “there was nothing coming” to the other partner out of the amount due the partnership. But previous to the giving of this note, the partners had requested the debtor on several occasions to pay the debt, but he had not done so. On appeal after judgment for Defendant, the court reversed the judgment stating that Lemiette “could not, by collusion with the debtor of the firm, obtain a security in his own name, and for his own benefit, to the exclusion of his partner.”

In the *Remington* case, the plaintiff (R) and defendant Murphy (M) were law partners. M on behalf of the partnership, entered into an agreement with defendant railroad company for the performance of legal services by the partnership for the railroad, but reported to R the amount of compensation to be received at a less amount than actually agreed upon. The railroad company also falsely stated this amount to R, as alleged by M. This was held to be collusion between M and the railroad to deceive R. No accounting of the affairs of the firm had been made and R joined M as a defendant because he refused to join as a plaintiff and sought recovery for reasonable value of the services rendered, and on appeal the holding was in favor of R.

In the *Rooks* case, reported only by "Syllabus by the Court", it appears that two persons entered into an agreement with the owner of property whereby the two were authorized to sell the property at any price above a fixed sum and were to receive one-half of the difference between that sum and the amount for which the property was sold. After the sale of the property the owner executed a deed to other property to one of the two in satisfaction of the claim for both for commissions, and it stated such a settlement was not binding upon the other unless he authorized or ratified it. But the report of this case, being limited to a meager "Syllabus by the Court," we find somewhat difficult to understand. The action was apparently brought by Rooks, who was not the one to whom the conveyance was made, against Stanaland, the owner of the property sold by these two. Judgment in the lower court in favor of Stanaland, was affirmed on appeal, which seems to indicate that the trial court found on the evidence that the plaintiff either authorized or ratified the settlement made by defendant. If the one who did not receive the conveyance in place of a payment of cash as a commission, authorized or ratified such a settlement, the claim of both was discharged. So far as we can determine nothing more was involved in the *Rooks* case.

We have made the rather lengthy analysis of section 131 and the "illustration" thereunder and reviewed the cases cited in the decision herein, because we are convinced they do not support the conclusion that defendant, having no knowledge or reason to know of fraud practiced on Hurley, is deprived of the protection of section 1475 Civil Code. In the opinion it is stated that this section "should have effect so long, and only so long, as the obligor may rightly assume that the one obligee to whom performance is furnished will account to the others." We submit

the obligor should be required to make no assumption in this regard in order to claim the benefit of section 1475 Civil Code, and that even an erroneous assumption by obligor that the obligee will or will not account to his co-joint tenants is immaterial. The applicability of this section is not determined by whether the obligee receiving performance accounts to his co-obligees. If the words above quoted were intended to mean that an obligor who knows or has reason to know that fraud is being or will be practiced, by the obligee receiving performance, against his co-obligees by not accounting, we concede this is correct, but not applicable to this case.

But we fail to comprehend how this court reaches its conclusion that "Here the Company had such knowledge. It knew Mrs. Price intended to and would keep the money." To reach any such conclusion it surely must at least appear affirmatively that defendant *in fact* knew or in the light of all of the circumstances had reason to know (1) of the forgery of plaintiff's signature, if any there was, and (2) that Mrs. Price, whether she knew of the forgery or not, would with the object of defrauding plaintiff, render no account to him. The possibility of defendant knowing or of having reason to know these matters are negated by the findings of the trial court. In order to secure the protection of 1475 Civil Code defendant was not bound "at its peril" to determine correctly that plaintiff's signature was genuine. (*Dezvey v. Metropolitan Life Ins. Co.*, 256 Mass. 281, 152 N.E. 82.)

The accumulated wisdom of the common law is embodied in section 1475 Civil Code as providing the only satisfactory means of satisfying an obligation due several joint obligors, and it should be the policy of the courts not to enlarge the exceptions to the application of this section.

II

**In the Absence of Knowledge or Reason to Know by Defendant of Fraud Practiced upon Plaintiff in Securing His Signature on the Dividend Orders, Even Though Plaintiff Was a Minor at the Time, Plaintiff Had no Right to Disaffirm as Against Defendant.**

The decision herein holds that plaintiff's disaffirmance of the dividend orders within a reasonable time after attaining majority rendered these orders void *ab initio*, even as against defendant. Assuming that these orders are in the nature of contracts of a minor (as this court apparently assumes), we submit that they can be considered only in the nature of assignment of an obligation due the minor from defendant. Under these facts, section 170(2) c of Restatement Contracts applies. It provides as follows:

“(2) Except as stated in Subsection (4) an obligor is discharged from any duty to the obligee or to any assignee, if he obtains for value, by performance or otherwise, a discharge of the duty

\* \* \*

(c) from any holder of an assignment voidable by the assignor because of infancy, insanity, fraud, duress, mistake or illegality, if the discharge is obtained in good faith prior to avoidance of the assignment by the assignor, and the obligor neither knows nor has reason to know facts showing that the assignment is voidable”.

(Restatement Contracts, section 170(2) (c)).

The exception noted in 170 (4) has no application in this case.

The express findings of the trial court show that defendant had no notice that plaintiff was a minor [Tr. Rec. pp. 53-54], nor of any fraud [Tr. Rec., p. 57]. It did not know that these assignments were voidable either because of infancy or fraud. It follows that defendant under the rule of common law embodied in Section 170 (2) c was discharged of its obligations as debtor to plaintiff by performance of the obligation to Mrs. Price, as plaintiff's assignee.

Section 170 (2) c was not, because of our oversight, referred to in Appellee's Brief. But on pages 27 to 35 of that brief, we do advance argument and cite authority in support of this common law rule. The cases cited in the court's decision on their facts are not, in conflict with this rule. None of the cases there cited deals with the question of the right of a minor to disaffirm a voidable assignment of a credit due him as against his debtor after payment has been made by the debtor to the assignee. The rule of law applied in these cases must be limited to the facts presented in each case. *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, was a suit to recover premiums on a life insurance policy taken out by a minor under 18 years old, and no problem of assignment was involved. *Pollock v. Industrial Acc. Comm.*, 5 Cal. 2d 205 grew out of an industrial accident to a 15 year old boy on account of which an award was made by respondent commission in a proceeding brought by the boy through his guardian *ad litem*. All sums due under the award were, before he reached 18 years of age, either paid to him or at his request deposited by the insurance carrier of the employer to the boy's credit with a savings and loan association which shortly thereafter became insolvent. The insurance carrier had contested the award and knew the boy was a minor. In its opinion, the court treats

the payments as if made directly to the boy and holds that payment to him was ineffective because not made to a lawfully appointed guardian. But in determining the effect of this decision, it must be kept in mind that the boy was under 18 years. Therefore, he had the right to disaffirm under Section 35 Civil Code without returning the consideration received by him. If he had been over that age, he would have been obliged under this section, as a condition of disaffirmance, to restore

“the consideration to the party from whom it was received, or paying its equivalent.”

If the boy had been 18 when receiving payment, no advantage could accrue to him by returning the payment and then demanding repayment. Nothing in the *Pollock* case can be construed as being in conflict with Section 35 Civil Code or the numerous California cases decided in accordance with that section, even though isolated passages of the opinion seem to have that effect. None of the Missouri cases cited involves an assignment by a minor or the question of the effect of a disaffirmance of a voidable assignment after performance by the debtor to the assignee.

In appellee's brief we took the position that the dividend orders must be construed either as a direction from a creditor given under Section 1476 Civil Code as to manner payment is to be made by his debtor, or as an assignment of the debt (pp. 27-35). The order of payment described in Section 1476 Civil Code obviously has the effect of an assignment and should be considered as such. Williston on Contracts, Rev. Ed. Vol. 2, p. 1223 states,

“If, however, an order which specifically requests payment of all or part of a particular fund or claim to which the drawer is entitled is delivered to a payee,

who is not the drawer's servant or agent, the order is interpreted as an assignment,"

citing in support of this statement many cases, including *Whcatley v. Strobe*, 12 Cal. 92, cited on page 24 of Appellee's Brief to this effect.

For additional authorities in support of the rule found in Restatement Contracts, Section 170 (2) c we refer to:

Williston on Contracts, Rev. Ed. Vol. 2, p. 1249;  
6 C. J. S. 1153, Sec. 98; 1163, Sec. 109;  
5 C. J. 960, Sec. 147.

As expressly indicated in Section 170 (2) c, the rule is applicable to all voidable assignments, regardless of why they are voidable, including those made by minors. Any right of avoidance an assignor may have after payment by debtor to assignee, must be limited to a rescission as against the assignee. This does not render the assignment void *ab initio* as against the debtor who without notice of the right of the assignor to avoid the assignment, has already paid the assignee.

A debtor presented with an assignment, having no notice that the assignor has and has exercised a right to disaffirm, is bound to the assignee.

This is pointed out in the two cases of *Casey v. Kastel* 237 N.Y. 305, 152 .....E. 671, 31 A.L.R. 995 and *Carolina Telephone & Telegraph Co. v. Johnson*, 168 F. 2d 489, 3 A.L.R. 2d 870, cited on page 31 of appellee's brief herein. Both of these cases involve the question of liability of a corporation for transferring stock belonging to a minor, where the minor had made an assignment of the stock. Both hold there is no liability in the corporation, where the minor disaffirms after the corporation issues a new certificate.

In the *Casey* case it is stated:

“The United States Steel Corporation is not in the same position as the defendants who sold the infant’s stock on her behalf. When it transferred the stock on its books to the ultimate purchaser and canceled the infant’s stock certificate, it did a valid act. No statute, as in *Merriam v. Boston C. & F. R. R. Co.*, 117 Mass. 241, made the transfer illegal. It acted under her authority without notice of her incapacity, in good faith, and without negligence. It was not bound to inquire whether the transfer was voidable, for nothing put it upon inquiry. It received nothing and retained nothing for which it can be called upon to account. It appropriated no property to itself. It was an intermediary in a sale by others: a conduit for the transfer of title. It destroyed a muniment of title merely, and did not deprive the plaintiff of her rights in the stock itself, which exists apart from the certificate. *Zander v. N. Y. Security & Trust Co.*, 178 N.Y. 208, 212, 70 N.E. 449, 102 Am. St. Rep. 492. It was guilty of no conversion after disaffirmance. Plaintiff might, with equal effect, have intrusted the certificate to a messenger to deliver to the purchaser. The messenger would have exercised no dominion over her property, done her no wrong, and made no gain, and, even if she afterwards disaffirmed the sale, could not be placed in the position of a tort-feasor. While there is no definite test of conversion of universal application (*Bramwell B, Burrows v. Bayne*, 5 Hurl. & N. 296, 308), the courts have not gone so far as to say that the acts of a corporation in recording a transfer of stock amount to a conversion of the stock.

The transfer being voidable only and legal and valid when made, the corporation had no right to refuse a transfer. *Smith v. Railroad*, 91 Tenn. 221,

239, 18 S.W. 546. It could have been compelled by the purchaser by recourse to the proper remedy to make it. *Travis v. Knox Terpczone Co.*, 215 N. Y. 259, 264, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387.”

*Casey v. Kastel*, 237, N.Y. 305, 142 N.E. 671, 31 A.L.R. 995.

We submit no distinction can be drawn between an assignment of stock by a minor and assignment of a debt by a minor.

For the reasons above shown, a rehearing should be granted herein.

Respectfully submitted,

CHAS. E. R. FULCHER,  
CAROL G. WYNN,  
FULCHER & WYNN.

By CAROL G. WYNN,

*Attorneys for Appellee.*

### Certificate of Counsel.

I, Carol G. Winn, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

CAROL G. WINN,

*Attorney for Petitioner.*

No. 12279

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United States  
Court of Appeals  
For the Ninth Circuit.

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ESTATE OF DELL HINDS HIGGINS, Deceased,  
SYDNEY M. HIGGINS, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States

AUG 26 1918

PAUL P. O'BRIEN,  
CLERK



No. 12279

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United States  
Court of Appeals  
For the Ninth Circuit.

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ESTATE OF DELL HINDS HIGGINS, Deceased,  
SYDNEY M. HIGGINS, Executor,  
Petitioner,

vs.

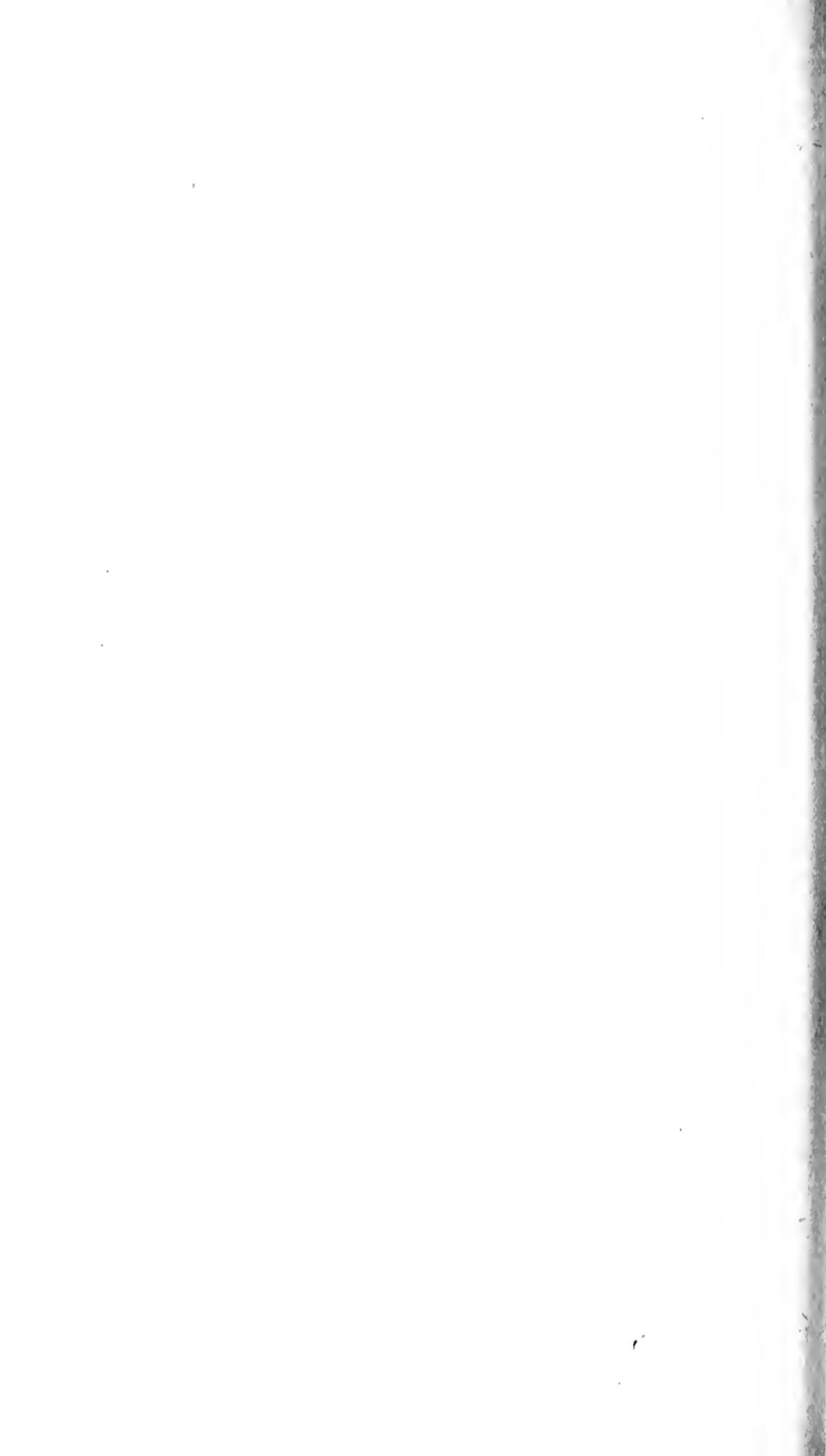
COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Petitioner:

GEORGE H. STONE

WM. D. MORRISON

For Respondent:

H. A. MELVILLE

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Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, deceased,  
SYDNEY M. HIGGINS, executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1946

May 13—Petition received and filed. Taxpayer notified. Fee paid.

May 14—Copy of petition served on General Counsel.

May 13—Request for hearing at Los Angeles filed by taxpayer. 5/16/46 Granted.

June 3—Amended petition filed. 6/3/46 Copy served.

1946

June 11—Notice of the appearance of George H. Stone as counsel filed.

June 24—Answer to amended petition filed by General Counsel.

June 27—Copy of answer served on taxpayer, Los Angeles, Calif.

1947

July 31—Hearing set Sept. 22, 1947, Los Angeles, Calif.

Sept. 22—Hearing had before Judge Opper on merits. Submitted. Stipulation of facts filed. Briefs due 11/6/47; replies 12/8/47.

Oct. 17—Transcript of hearing 9/22/47 filed.

Oct. 23—Motion for extension to Dec. 5, 1947 to file brief filed by taxpayer. 10/30/47 Granted.

Nov. 4—Motion for extension to Dec. 31, 1947 to file brief filed by General Counsel. 11/5/47 Granted.

Nov. 17—Motion for extension to Dec. 31, 1947 to file brief filed by taxpayer. 11/17/47 Granted.

Dec. 19—Brief filed by taxpayer. 12/30/47 Copy served.

Dec. 29—Brief filed by General Counsel.

1948

Jan. 26—Reply brief filed by taxpayer. Copy served.

Jan. 28—Reply brief filed by General Counsel.

1949

- Feb. 16—Memorandum findings of fact and opinion rendered, Judge Oppen. Decision will be entered for the respondent. Copy served 2/17/49.
- Feb. 17—Decision entered, Judge Oppen, Div. 14.
- May 11—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.
- May 12—Proof of service filed.
- June 6—Designation of record with proof of service thereon filed by taxpayer.

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The Tax Court of the United States

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, deceased,  
SYDNEY M. HIGGINS, executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency, Los Angeles Division, LA: ET: 90D: NAB, dated March 20, 1946, and as a basis of their proceedings alleges as follows:

1. The petitioner is the Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, with principal office c/o George H. Stone, 1004 San Diego Trust and Savings Building, San Diego 1, California. The return for the period here involved was filed with the Collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on March 20, 1946.

3. The taxes in controversy are estate taxes of the above-named estate, and in the amount of twenty-nine thousand nine dollars and sixty-nine cents (\$29,009.69). (The decedent's, Dell Hinds Higgins, death occurred March 3, 1945.)

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the estate tax of the petitioner the Commissioner has erroneously included in the value of the net estate the following item:

Additions to value of net estate transfers during decedent's life the sum of \$188,302.40.

(b) The Commissioner has erroneously included as a part of the gross value of the Estate of Dell Hinds Higgins the following item:

Corpus of a trust created by decedent March 24, 1928, (through error referred to in letter of defici-

ency as March 28, 1928) of the value at date of death \$188,302.40.

(c) The Commissioner has erroneously determined that the transfer of property to the trust during decedent's lifetime was made in contemplation of death and was intended to take effect in possession or enjoyment at decedent's death and subject to inclusion in the gross estate of decedent and comes within the provisions of section 811(c) of the Internal Revenue Code.

(d) The Commissioner has erroneously determined that the decedent reserved the power to alter, amend, revoke, or terminate the trust, and that the property transferred to the trust during decedent's lifetime is subject to inclusion in the gross estate of decedent under the provisions of section 811(d) of the Internal Revenue Code.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) A trust indenture dated the 24th day of March, 1928, was made and entered into by Dell M. Harrow, who later became known as Dell Hinds Higgins, (now deceased) and the Bank of Italy National Trust and Savings Association, subsequently The First National Trust and Savings Bank of San Diego, California, became trustee under the said trust indenture.

The trustor (now deceased) did by the said indenture irrevocable divest herself without reversion of the corpus of the property transferred to the trustee. A copy of the said trust indenture is

marked Exhibit B attached hereto and made a part hereof.

(b) The petitioner contends the decedent was approximately 59 years of age at the date of the trust indenture, which was March 24, 1928, in good health, did not make the gift or transfer the property in contemplation of death, and lived to the age of about 76 years, which was approximately 17 years after the trust indenture was entered into.

(c) The petitioner contends that no part of the corpus of the trust created by decedent March 24, 1928, as valued at date of death, in the sum of \$188,302.40, should be included as a part of either the gross or net Estate of Dell Hinds Higgins, Deceased.

(d) The petitioner contends that the transfer of the property as set out in the said trust indenture of March 24, 1928, which by its terms was irrevocable, fully, completely, and without reversion divested the trustor of the property transferred during her lifetime, was not made in contemplation of death and was not intended to take effect in possession or enjoyment at decedent's death, but was effective at the date of the trust indenture, namely March 24, 1928, and that the value of the property in controversy in the sum of \$188,302.40, does not come within the provisions of section 811(c) as was erroneously determined by the Commissioner.

(e) The petitioner contends that the trustor (now deceased) did not reserve unto herself the power to alter, amend, revoke, or terminate the

trust, that on March 24, 1928, the trustor fully, completely, and without reversion divested herself of the property in controversy valued at date of decedent's death at \$188,302.40, and the said trust is not subject to inclusion in either the net or gross estate under the provisions of section 811(d) as was erroneously determined by the Commissioner.

(f) The petitioner contends that the decedent transferred the property, which at the time of her death was valued by the Commissioner at \$188,302.40, fully, completely, and without reversion and at the date of the transfer which was March 24, 1928, neither section 811(c) nor 811(d) of the Internal Revenue Code had at that time been enacted by Congress. The Commissioner erroneously construed the aforesaid sections of the Code as applicable to the value of the trust property at the date of the decedent's death and erroneously determined a deficiency of estate tax liability of \$29,009.69.

(g) The petitioner contends the inclusion of the value of the trust property in either the net or gross value and the determination of a deficiency of estate tax, or the assessment of a tax thereon, is erroneous on the part of the Commissioner and is contrary to the fourteenth amendment to the Constitution of the United States of America.

6. Wherefore, the petitioner prays this Court may hear the proceeding and determine that there

is no deficiency due from the petitioner in the sum of \$29,009.69, or any other sum.

/s/ GEORGE H. STONE,  
Counsel for Petitioner.

/s/ WM. D. MORRISON,  
Counsel for Petitioner.

State of California,  
County of San Diego—ss.

Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ SYDNEY M. HIGGINS.

Subscribed and sworn to before me this 28th day of May, 1946.

[Seal] /s/ DORA C. GEISHCHLER,  
Notary Public in and for County of San Diego,  
State of California.

My commission expires April 12, 1950.

EXHIBIT A

Copy

Treasury Department  
Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

March 20, 1946.

Office of  
Internal Revenue Agent  
in Charge  
Los Angeles Division  
LA:ET:90D:NAB

Estate of Dell Hinds Higgins, Deceased  
Mr. Sydney M. Higgins, Executor  
c/o Mr. George H. Stone  
1004 San Diego Trust & Savings Building  
San Diego, California

Dear Mr. Higgins:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency of \$29,009.69, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Wash-

ington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf.

The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent in  
Charge.

NAB:vmc

Enclosures:

Statement

Form of waiver

LA:ET:90D:NAB

District of Sixth California

Estate of Dell Hinds Higgins

Date of death: March 3, 1945

STATEMENT

	Liability	Assessed	Deficiency
Estate tax .....	\$29,009.69	\$ 0.00	\$29,009.69

In making this determination of the federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination dated December 22, 1945, to the protest dated February 15, 1946, and to the statements made at the hearing on March 12, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. George H. Stone, 1004 San Diego Trust & Savings Building, San Diego, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET ESTATE:

Net estate for basic tax as disclosed		
by the return.....		(\$ 97,071.11)
Additions to value of net estate and		
decreases in deductions:		
Transfers during decedent's		
life .....	\$188,302.40	188,302.40
Net estate for basic tax as adjusted....		\$ 91,231.29
Net estate for additional tax as		
adjusted .....		\$131,231.29

EXPLANATION OF ADJUSTMENTS

Transfers during decedent's life—

The value of the following described property, transferred by the decedent in her lifetime, is included in the gross estate, it being determined that such transfer was made in contemplation of death and was intended to take effect in possession or enjoyment at decedent's death and comes within the provisions of section 811(c) of the Internal Revenue Code, and that as decedent reserved the power

to alter, amend, revoke, or terminate the trust, it is subject to inclusion in the gross estate under the provisions of section 811(d) of the Internal Revenue Code:

	Returned	Determined
Corpus of a trust created by decedent		
March 28, 1928, of the value of at date of death .....	\$ 0.00	\$188,302.40
<b>COMPUTATION OF ESTATE TAX</b>		
	Returned	Determined
Gross estate for		
basic tax .....	\$ 5,406.27	\$193,708.67
Deductions .....	102,477.38	102,477.38
Net estate for basic tax.. (\$ 97,071.11)	\$	\$ 91,231.29
Net estate for additional tax .....	\$ 0.00	\$131,231.29
Gross basic tax.....	\$	\$ 1,324.63
Credit for estate and inheritance tax .....		1,059.70
Net basic tax.....		\$ 264.93
Total gross taxes (basic and additional) .....	\$ 30,069.39	
Gross basic tax.....	1,324.63	
Net additional tax.....		28,744.76
Total net basic and additional taxes....		\$ 29,009.69
Total tax payable .....		\$ 29,009.69
Estate tax assessed.....		0.00
Deficiency .....		\$ 29,009.69

## EXHIBIT B

### Copy

#### Trust Indenture

This Indenture made and entered into this 24 day of March, 1928, by and between Dell M. Harrow, hereinafter referred to as "Trustor," and

EXHIBIT B—(Continued)

Bank of Italy National Trust and Savings Association, a national banking association, organized and existing under the laws of the United States of America, hereinafter referred to as "Trustee,"

Witnesseth:

1. Trustor hereby grants, assigns and transfers unto Trustee, and its successors in trust, all of Trustor's right, title and interest in and to the following described property, to wit:

(Description of original trust property.)

(Omitted)

.....  
.....

This grant, assignment and transfer of said property is in trust and strictly upon the trusts and confidences hereinafter set forth. Trustor agrees to execute and deliver to the Trustee, or its successors in trust, all such further grants, assignments and transfers as may be necessary to fully vest title to all of the above described property in said Trustee, or its successors in trust, and similarly agrees, as required, to endorse whatever notes, securities or other documents require such endorsement, and in general agrees to do any and all things necessary or convenient to fully vest title to all of the above property in said Trustee, or its successors in trust.

2. This grant, assignment and transfer of said property is in trust and strictly upon the trusts and confidences hereinafter set forth. The Trustee hereby acknowledges and declares that it has given

## EXHIBIT B—(Continued)

no consideration to the Trustor for any of the above described property, and the Trustee hereby receives and accepts all of said above described property upon the trusts and confidences hereinafter set forth, and the Trustee hereby declares that it holds all of said above described property upon said trusts hereinafter set forth, and the Trustee hereby promises and agrees to fully and faithfully carry out and perform each and every provision of this trust as hereinafter set forth.

3. The Trustee shall perform the following duties and shall have the following described powers in respect to the property hereinabove described (hereinafter referred to as the "Trust Estate") to wit:

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth.

b. The Trustee shall collect and receive all the income and profits of the Trust Estate and shall

## EXHIBIT B—(Continued)

pay out and disburse the same as hereinafter provided.

c. The Trustee shall be permitted to hold any real property coming into its possession by reason of foreclosure of mortgage or sale under any trust deed, or otherwise, a reasonable length of time if it shall be necessary to hold such real property over a period of time in order to dispose of the same to the best advantage of the Trust Estate; no obligation of the Trustee assumed under this agreement shall be deemed to require the Trustee to sacrifice any real property, or any other property of the Trust Estate, in order to convert such property into income producing investments.

d. The Trustee is authorized and empowered, and it shall also be the duty of the Trustee to preserve and protect the Trust Estate in every manner and in every way and to pay all taxes and insurance necessary to be paid in respect to the Trust Estate and to keep, preserve and repair all real property and all other property of the Trust Estate.

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Ken-

## EXHIBIT B—(Continued)

dall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, The Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

4. Out of the gross income of the Trust Estate the Trustee shall pay the costs and expenses of the Trust Estate, including taxes, insurance, etc., reasonable attorney's fees and reasonable fees for the services of the Trustee in the management of the Trust Estate.

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the Trustor:

a. Seventy-five dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

## EXHIBIT B—(Continued)

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

6. This trust shall cease and terminate upon the death of the survivor of Dell M. Harrow (Trustor herein) Helen B. Kendall and Sydney M. Higgins. Upon the termination of this trust, as herein provided, the entire corpus of the Trust Estate shall go to and be distributed among the issue of Helen B. Kendall and Sydney M. Higgins, by right of representation, that is to say, one-half ( $\frac{1}{2}$ ) of the entire corpus of the Trust Estate to the issue of Helen B. Kendall, by right of representation, and one-half ( $\frac{1}{2}$ ) of the entire corpus of the Trust Estate to the issue of Sydney M. Higgins, by right of representation. If there is no living issue of one or the other of Helen B. Kendall or Sydney M. Higgins at the time of the termination of this trust, then the entire corpus of the Trust Estate shall go to the issue of the other, and if there is no issue of either Helen B. Kendall or Sydney M. Higgins living at the time of the termination of this trust then the entire corpus of the Trust Estate shall go to the respective heirs at law of Helen B. Kendall and Sydney M. Higgins, as said Heirs at law are indicated in Section 1386 of the Code of Civil Procedure of the State of California, one-half ( $\frac{1}{2}$ ) of the corpus of the Trust Estate to the heirs at law of Helen B.

## EXHIBIT B—(Continued)

Kendall and one-half ( $\frac{1}{2}$ ) to the heirs at law of Sydney M. Higgins.

7. If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

8. Each and every beneficiary under this trust is hereby restrained from and are and shall be without right, power and authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, claims and estates in and to the income and/or principal of this trust during the entire term hereof, nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor liable to any process of law or court, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above des-

## EXHIBIT B—(Continued)

ignated beneficiaries hereunder at the time entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder shall be a condition precedent to the payment or delivery of the same by said Trustee to each such beneficiary.

9. This trust shall be irrevocable. However, the Trustor during her lifetime reserves the right from time to time to appoint a new and different Trustee to execute the trusts herein set forth and upon designation in writing by the Trustor of such new Trustee the Trustee herein shall turn over to such new Trustee all of the Trust Estate and the Trustee shall furnish the new Trustee with copies of all such records and accounts pertaining to the Trust Estate as the new Trustee may reasonably require, and upon such appointment and upon such delivery of the Trust Estate to such new Trustee the new Trustee shall succeed to all the powers and obligations of the Trustee herein designated, as hereinabove set forth in this agreement. The Trustor shall be restricted in the designation of a new Trustee to an incorporated trust company authorized to do a trust business in the State of California under the laws of either the State of California or the laws of the United States. After the death of Trustor the same right to designate and appoint a new Trustee shall continue in Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

In Witness Whereof the Trustor has set her hand

## EXHIBIT B—(Continued)

and seal and the Trustee has caused this instrument to be executed by its properly authorized officers the day and year first hereinabove written.

/s/ DELL M. HARROW,

Trustor.

BANK OF ITALY NATIONAL  
TRUST AND SAVINGS  
ASSOCIATION,

By /s/ E. O. HODGE,

Vice-President.

By /s/ R. E. HAGENBRUCH,

Assistant Trust Officer,

Trustee.

State of California,

County of San Diego—ss.

On the 24 day of March 1928, before me, Gudmund Eiriksson, a Notary Public in and for the County of San Diego, State of California, personally appeared Dell M. Harrow, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of San Diego, the day and year in this certificate first above written.

/s/ GUDMUND EIRIKSSON,

Notary Public in and for the County of San Diego,  
State of California.

EXHIBIT B—(Continued)

State of California,  
County of San Diego—ss.

On this 26th day of March, 1928, before me H. D. Beekley, a notary public in and for said County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared E. O. Hodge, known to me to be the vice president, and R. E. Hagenbruch, known to me to be the Assistant Trust Officer of Bank of Italy, National Trust and Savings Association, the corporation that executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of San Diego, the day and year first above written.

/s/ H. D. BEEKLEY,

Notary Public in and for the County of San Diego,  
State of California.

Received June 3, 1946. T.C.U.S.

Filed and Docketed June 3, 1946. T.C.U.S.

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[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of

Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the amended petition.

4(a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the amended petition.

5(a) to (g), inclusive. Denies the allegations contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the amended petition.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.  
E. C. CROUTER,  
H. A. MELVILLE,  
Special Attorneys,  
Bureau of Internal Revenue.

Received June 24, 1946. T.C.U.S.

Filed and Docketed June 24, 1946. T.C.U.S.

[Title of Tax Court and Cause.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue and the above entitled Petitioner, by their respective and undersigned attorneys, that the following facts may be accepted as true reserving to either party the right to introduce any proper evidence not inconsistent therewith:

#### Facts

1. The decedent, Dell Hinds Higgins, was born May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, State of California. Her last Will and Testament was admitted to probate and petitioner, Sydney M. Higgins, was duly appointed and qualified as Executor. Petitioner filed a Federal Estate Tax return for decedent's estate with the Collector of Internal Revenue for the Sixth District of California on or about May 15, 1945, which may be received in evidence as petitioner's and respondent's Joint Exhibit 1-A, with the understanding that it may be withdrawn by the respondent and a photostatic copy substituted therefor.

2. In 1887 decedent married Albert Edward Higgins. Two children were born of said marriage, a son, Sydney M., born March 2, 1889, and a daughter, Helen B., born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall and thereafter her name has been Helen B. Kendall. The decedent's first husband died in 1913. Both

children survived their parents and are still living.

3. On April 9, 1925, decedent married Samuel Harrow who divorced decedent and received a final decree of divorce July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins.

4. On March 24, 1928, decedent created a trust, a photostatic copy of which is attached hereto as Joint Exhibit 2-B. To this trust the decedent transferred everything she owned, except her car, her jewelry, a savings account with Southern Trust and Commerce Bank, San Diego, California, number 80159, in the sum of \$5,418.51, and her salary of \$70.00 per month as Vice President of Hinds Estate, Inc. In said trust Bank of Italy National Trust and Savings Association, was named as Trustee, which was subsequently changed by action of the Trustor to San Diego Trust & Savings Bank and subsequently again changed by the further action of the Trustor to The First National Trust and Savings Bank of San Diego which was the Trustee from March 13, 1942, to the date hereof.

5. She had the trust prepared as irrevocable by her attorney and in such form as he advised would not be subject to Federal Estate Tax.

6. That on February 6, 1941, the Trustor and her two children, beneficiaries thereunder, filed in the Superior Court of the State of California against San Diego Trust & Savings Bank, then Trustee under said trust, their Complaint for declaration of rights under trust indenture and for equitable relief. A certified copy of said complaint is attached hereto as Joint Exhibit 3-C.

7. That Answer by San Diego Trust & Savings Bank as Trustee was filed February 25, 1941, a certified copy of which is attached hereto as Joint Exhibit 4-D.

8. Thereupon the Court, on March 13, 1941, entered its Decree, a certified copy of which is attached hereto as Joint Exhibit 5-E.

9. On April 19, 1941, the Trustor and her two children, beneficiaries, filed in said Court notice of motion to vacate and set aside the judgment entered March 13, 1941, on the grounds of mistake and inadvertence as set forth in the affidavit of George H. Stone attached to said motion. Certified copies of said motion and affidavit are attached hereto as Joint Exhibits 6-F, 1 and 2. Trustee appeared by counsel pursuant to motion, which motion and appearance are referred to in the decree and the said decree is the document identified in paragraph 10 as Joint Exhibit 7-G.

10. On April 21, 1941, the said Court made its decree, a certified copy of which is attached hereto as Joint Exhibit 7-G.

11. The Trustor and her two children, beneficiaries under said trust, on May 27, 1943, filed a Petition for an order allowing payment from the corpus of the trust. A certified copy of said Petition is attached hereto as Joint Exhibit 8-H. Affidavit of Mailing Notice to the Trustee, which Notice was dated May 27, 1943, was filed on June 1, 1943.

12. On June 11, 1943, Order of the Court allowing payment from corpus as prayed for was en-

tered. A certified copy of said order is attached hereto as Joint Exhibit 9-I.

13. On October 25, 1943, Trustor and her two children, beneficiaries under said trust, filed their petition for order allowing additional payment from corpus of the trust. A certified copy of said petition is attached hereto as Joint Exhibit 10-J. Affidavit of Mailing Notice to the Trustee, which Notice was dated November 5, 1943, was filed November 5, 1943.

14. On November 19, 1943, said Trustor and her children, beneficiaries, filed their Amendment to Petition for order allowing additional payments from the corpus of the trust. A certified copy of said Amendment to Petition is attached hereto as Joint Exhibit 11-K. Notice of Hearing was given on original Petition as stated in paragraph 13 hereof.

15. On November 19, 1943, Order of the Court was made allowing additional payments from corpus of the trust. A certified copy of said Order is attached hereto as Joint Exhibit 12-L.

16. That pursuant to said Order said Trustee during the year 1943, subsequent to the Order of Court of June 11, 1943, paid out of corpus of the trust to the Trustor as beneficiary, pursuant to said Order the sum of.....\$ 624.06  
 Paid in 1944 pursuant to said Order..... 1,175.17  
 Paid in 1945 prior to Trustor's death

March 3, out of corpus, pursuant to said  
 Order ..... 130.25

Total payments out of corpus.....\$1,929.48

No corpus was ever used for the benefit of either of the two children of Trustor, beneficiaries in said trust. Subsequent to the death of the decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—Bradley-Woolman Mortuary	
funeral expenses .....	\$ 574.94
8/22/45—W. S. Heller, County Treasurer	
California State Inheritance Tax	
in matter of Estate of Dell Hinds	
Higgins, deceased, per order of	
fixing Inheritance Tax dated	
8-1-45 .....	3,262.44

An Affidavit setting forth the said items is attached hereto as Joint Exhibit 13-M. The items shown in the two Schedules, J and K, of the Estate Tax Return, identified herein in paragraph 1 as Joint Exhibit 1-A, were all paid out of the Estate of decedent and not out of the trust, except the item of funeral expense shown in Schedule J, Item 1.

17. At the date of the death of the decedent, March 3, 1945, there was property in the trust which she created on March 24, 1928, as set out in certified copy of an inventory which is attached hereto as Joint Exhibit 14-N.

18. At the time of the death of the decedent, namely, March 3, 1945, she owned only her car which was sold to her daughter, Helen B. Kendall, her jewelry, and other personal effects as shown in Schedule F of Joint Exhibit 1-A, which were dis-

posed of in accordance with her will dated April 8, 1940, a copy of which is attached to Joint Exhibit 1-A, and cash amounting to \$1,980.27 as shown in Schedule C of Joint Exhibit 1-A.

/s/ GEORGE H. STONE,  
Counsel for Petitioner.

/s/ WM. D. MORRISON,  
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,  
ECC.

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Filed Sept. 22, 1947.

The Tax Court of the United States

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, De-  
ceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Before: Honorable Clarence V. Opper,  
Judge.

Appearances:

GEORGE H. STONE,

Suite 1004 San Diego Trust  
and Savings Building,  
San Diego, California

and

WILLIAM D. MORRISON,

825 Bank of America Building  
San Diego 1, California,

Appearing for the Petitioner.

H. ARLO MELVILLE,

HONORABLE CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue,

Appearing for the Respondent. [1\*]

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\* Page numbering appearing at top of page of original Reporter's Transcript.

## PROCEEDINGS

\* \* \*

Whereupon,

## SYDNEY M. HIGGINS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Sydney M. Higgins.

## Direct Examination

By Mr. Stone:

Q. Mr. Higgins, you are a little hard of hearing, I believe?      A. I am.

Q. And that is of some recent occasion, is it?

A. Pardon?

Q. You have not been hard of hearing very long?

A. No, I have not.

Q. How long?

A. 1945, the last day of May.

Q. What caused it?

A. I went out on a destroyer, and my hearing was destroyed by gun fire.

Q. You will have to talk a little louder.

A. I am having difficulty getting used to this thing. My hearing was destroyed by gun fire on a destroyer at sea the last day of May, 1945. [17]

Q. You were in the service in the Navy at that time?

A. Yes, sir, United States Naval Reserve as a commander.

(Testimony of Sydney M. Higgins.)

Q. For how long?

A. Since August, 1942.

Q. And before that what was your occupation or business?

A. Insurance business.

Q. Where?

A. In San Francisco, California.

Q. Where were you living at that time in the insurance business?

A. Where was I living?

Q. Yes.

A. I was living in San Anselmo, Marin County.

Q. That is near San Francisco?

A. That is near San Francisco, north of San Francisco.

Q. Where were you living in March, 1928?

A. I was living in San Anselmo.

Q. What was your business at that time?

A. I was in the insurance business.

Q. You are the son of Dell Hinds Higgins?

A. I am.

Q. And she was at one time named Dell Harrow by a second marriage? [18]

A. That is correct.

Q. How old are you?           A. I am 58.

Q. Did you know when the trust that is in question here was made, which was on March 24, 1928?

A. I did.

Q. Were you present in San Diego while it was being discussed by your mother?

A. I was.

(Testimony of Sydney M. Higgins.)

Q. How did you happen to be in San Diego for that occasion?

A. A doctor at Paradise Sanitarium where my mother was staying telephoned to me a certain occurrence had taken place and I should come down immediately.

Q. What was that occurrence you refer to?

A. Well, sometime prior to this Mr. Harrow had been making demands upon my mother for money constantly——

Mr. Melville: Just a minute. It is not clear from this witness' testimony whether he is now telling what the doctor told him or what somebody else told him.

Mr. Stone: I think you should limit it to what the doctor told you at that time.

Mr. Melville: I object to that, your Honor. It is hearsay.

The Witness: My mother wrote me. [19]

Mr. Melville: I object, your Honor. That is hearsay.

The Witness: No, it is not hearsay, because my mother wrote me letters.

Mr. Stone: Just a minute, please, until the court rules.

The Court: As I understand, you are trying to prove what the doctor said because you want to get it in the record and not to prove the fact, is that correct?

Mr. Stone: That is correct.

(Testimony of Sydney M. Higgins.)

The Court: I will overrule the objection.

Q. (By Mr. Stone): Answer the question as to what the doctor told you.

A. The doctor told me that Mr. Harrow was coming out there quite frequently and disturbing my mother by making demands upon her for advances, that is, demands for money, and my mother wrote me the same thing, many, many letters, and I never could persuade her against Harrow at that time, and we felt that——

Q. Just go on. What else, if anything, did the doctor tell you in that conversation?

A. The doctor told me that that morning my mother had walked downstairs from her room and was sitting out in the front garden, had a chair, that Harrow came to her [20] and conversed with her and suddenly stepped off a few feet and threw a bunch of keys at my mother and hit her in the face. It was seen by the doctor and was seen by people sitting in the immediate vicinity, and my mother immediately realized the sort of man he was and the doctor telephoned me to come down immediately and I did.

Q. Was your mother injured at all by those keys?

A. Yes, she was cut in the face.

Q. You saw the cut?

A. I saw the cut.

Q. What was that, Paradise Valley Sanitarium, you say?

(Testimony of Sydney M. Higgins.)

A. That is where the happened.

Q. That is in National City near San Diego?

A. National City near San Diego.

Q. What was she there for in the hospital, in the sanitarium?

A. Well, she was in rather a nervous condition and she wanted to get away from Mr. Harrow, and the only means that she could find was to go to a place like that where he could not follow her.

Q. And when you came down there, did you have any discussion with her in regard to a trust?

A. No, I just discussed the situation with her, and after leaving her I went into San Diego and not knowing what [21] action to take, and I met an old friend of mine, who is a very prominent attorney in San Francisco, and I told him the situation and he said, "I think I know the answer to that. I think I know how, what can be done to make him get out once and for all. And he said, "I think we could take all of her property and put it in a trust and completely beyond her control or anybody else's control so that he would be unable to get a cent."

Now, he had come out, my mother told me that the reason for his throwing the keys was that he had brought certain papers out there for her to sign giving him all of her property, and it was her refusal to sign that paper that caused him to get angry and throw the keys and hit her.

Q. What was the name of this attorney you spoke of?           A. Roland Foerster.

(Testimony of Sydney M. Higgins.)

Q. Do you know the name of the firm that he is connected with?

A. Foerster Hohfeld Morrison—four or five names.

Q. Could it be Morrison Hohfeld Foerster Shuman & Clark?

A. That is the San Francisco firm; yes, sir.

Q. They also have a San Diego office?

A. They also have a San Diego office.

Q. Well, he had a big interest in it?

A. Yes, he was a partner. [22]

Q. Now, did Mr. Foerster discuss with your mother the general subject of the trust?

A. No, Mr. Foerster didn't, but Mr. Cobb, an associate and member of the firm, did discuss the terms with my mother.

Q. Were you present?

A. I was present at the time.

Q. Was the trust that was formed early in March 1928 the result of that discussion?

A. That was the result of it, after numerous conferences.

Q. At that time was there anything said by the attorneys as to whether or not the trust as it was prepared would be subject to Federal estate tax?

A. Yes, he did discuss that subject.

Q. What was said about it?

A. He said it would not be subject to Federal estate tax.

(Testimony of Sydney M. Higgins.)

Q. Was that the purpose of making the trust, to avoid the Federal estate tax?

Mr. Melville: I object to that, your Honor. That calls for a conclusion of this witness as to what was in somebody's mind—somebody else's mind.

The Court: You are asking as to whether the mother said that was the purpose, is that right?

Mr. Stone: No, I think I did ask him what was the purpose.

Mr. Melville: Will the reporter read the question?

(The question was read.)

The Court: This witness did not make the trust.

Mr. Stone: No. Was that your mother's purpose in making the trust?

Mr. Melville: I object to that, your Honor; calls for a conclusion of the witness as to somebody else's purpose, and that, your Honor, is exactly what you are going to have to decide.

The Court: Overruled.

Q. (By Mr. Stone): What is your answer?

A. It was not made for that.

Q. What was the purpose of her making the trust?

A. Just the reason that I went down to San Diego, to get rid of this man, to get her property in such a condition that he could not—not only that he could not touch it but that she could not, that she could not have access to a cent's worth of her property. That was the sole purpose of this trust.

(Testimony of Sydney M. Higgins.)

Q. Was there a question of Harrow's divorce from your mother entered into at that same time?

A. Not at that time, only it was anticipated. It was [24] an anticipated action.

Q. And was there any money paid to Harrow at that same time?

A. There was \$5,000.00 paid to him.

Q. For what reason?

A. When he married my mother he gave up his job in San Diego, thereby being incapable of supporting her, and we felt that if this trust was made and he should not get hold of any of her property, that he would undoubtedly go into court and get a divorce, and at the same time ask the court for a monetary settlement, inasmuch as he had given up his job. We thought that by offering him \$5,000.00 that he would accept it, we would forever remove any contingency, and he did accept it and was paid.

Q. Did you know when he was paid the \$5,000.00?

A. He was paid within a few days after the trust was made, as I recall it. Mr. Cobb told me in a conference that he had offered him money and he had accepted the check and he was paid cash.

Q. What was your mother's mental and physical condition at the time the trust was made and immediately preceding that?

A. Well, it was perfectly clear in every way. She discussed the minutest questions with me, and all that. The only reason she didn't want to sign

(Testimony of Sydney M. Higgins.)

the trust was that she [25] was going to lose control of her property and she always was a very good business woman and she didn't like the picture, but she felt that was the only way she could get free of this man.

Q. Was she ill?

A. No, she was in a nervous condition. She was not ill. She was able to manage all of that, she seemed, and she discussed perfectly plainly.

Q. Did she make any remark about expecting death or being near to death?

A. None whatsoever.

Q. Was she at that time in any condition that you could see that might be near death?

A. No, none whatsoever.

Q. Was there any discussion of making that trust in a line of testamentary disposition?

A. Her immediate death or any time near was not anticipated, except that we all expect to die some day, and any trust anticipates the death of the maker is possible at some time in the future, but not at that time, no, and I think one proof of that is that the day after my mother signed the trust I went back. I wouldn't leave my mother in the condition bordering on death, most certainly.

Q. Then at the time you left she was not seriously ill? [26]

A. No, she was not.

Q. I understand she was not physically ill at all?

A. I beg your pardon.

Mr. Stone: Read the question, please.

(The question was read.)

(Testimony of Sydney M. Higgins.)

The Witness: No, not a bit. She walked down-stairs the morning that she was hit with the keys, she walked down from the second floor out into the garden and sat down in a chair.

Q. (By Mr. Stone): Did you ever see any letter from any relative of Mr. Harrow's concerning his getting hold of the Higgins' property?

A. I did.

Q. Where did you see it?

A. In the Clift Hotel in San Francisco, California.

Q. Where was the letter?

A. The letter was under a desk blotter there, a large blotter.

Q. Did your mother see it?

A. My mother found it.

Q. And showed it to you?

A. And she showed it to me.

Q. Do you have the letter?

A. No, I haven't the letter, because it didn't belong [27] to her and didn't belong to me.

Q. When was that?

A. Oh, that was about 1927, sometime in there.

Q. Who was it from?

A. It was from his daughter in Boston, Massachusetts.

Q. To whom?           A. To Mr. Samuel Harrow.

Q. Do you know what it said in regard to getting her property?

Mr. Melville: Your Honor, I think this has gone

(Testimony of Sydney M. Higgins.)

far enough. I object to this as being entirely hearsay and not the best evidence.

The Court: Well, what do you say about his accounting for the original?

Mr. Melville: He says he doesn't have it.

The Witness: No, but I read it.

The Court: I think you will have to go into that further, to show what effort was made to get it.

Q. (By Mr. Stone): Do you know what became of the letter? A. No, I don't.

Q. Have you searched for it?

A. No. It was not my mother's property and it was not mine, so she put it back where she found it.

Q. And left it there? [28]

A. And left it there.

Q. Was it in her belongings at the time of her death? A. It was not.

Q. You are executor of her estate?

A. None that I found.

Mr. Stone: I renew the question.

The Court: Just a minute. Whose property was it? I will ask you. You can ask the witness if you don't know.

Mr. Stone: You mean the letter?

The Court: Yes.

Q. (By Mr. Stone): Whose property was the letter?

A. The property of Mr. Harrow and it was addressed to him.

(Testimony of Sydney M. Higgins.)

The Court: Where is Mr. Harrow now?

Q. (By Mr. Stone): Do you know where Mr. Harrow is?

A. At the present time I would say he is in San Diego. I don't know. I haven't seen him since 1928.

The Court: I will sustain the objection. You made no effort to subpoena the letter?

Mr. Stone: You may cross-examine.

The Court: We will take a recess until 2:00 o'clock.

Mr. Stone: Just a minute, your Honor, just one more question.

Q. (By Mr. Stone): Did you receive any income from the trust? A. I did.

Q. \$75.00 a month as provided?

A. \$75.00 a month.

Q. And your sister received the same?

A. I understand so.

Q. Have you ever received any principal of the corpus of the trust? A. Not a penny.

Mr. Stone: That is all the questions I have.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [30]

## Afternoon Session

The Court: Proceed with the case on hearing, Estate of Dell Hinds Higgins.

Mr. Melville: Will the witness resume the stand for cross-examination?

Whereupon,

## SYDNEY M. HIGGINS

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

## Cross-Examination

By Mr. Melville:

Q. Mr. Higgins, the parties have stipulated that your father died in 1913. Where were you living at that time? A. At Los Angeles.

Q. When did you cease living, or did you ever live, in San Diego?

A. Yes, I lived in San Diego. I was born in San Diego.

Q. When you were living in Los Angeles at the time of your father's death, were you living with your parents? A. Yes, I was.

Q. When did you leave your mother and start living elsewhere?

A. In 1914, about the fall of 1914. [31]

Q. Is that when you moved to the northern part of the state, up north of San Francisco?

(Testimony of Sydney M. Higgins.)

A. No, my mother came down to San Diego and I stayed at San Francisco.

Q. How often did you see your mother from them on? A. Quite frequently.

Q. Well, would you say twice a year?

A. Oh, sometimes more than that, sometimes about twice a year. Sometimes she came up north, usually about once a year, and sometimes twice a year, and I used to come down and see her.

Q. Do you know when your mother first met Mr. Harrow?

A. No, I was in the Navy in the First World War, and after the Armistice I was on a destroyer and came back here in September, I think September of 1919, and that was the first time that I met him.

Q. You met Mr. Harrow at that time?

A. At San Diego, the destroyer I was aboard put in at San Diego and I met him at that time for the first time.

Q. Did you meet him through your mother?

A. I beg your pardon?

Q. Did you meet Mr. Harrow through your mother?

A. Yes, I did; through my mother.

Q. How long had she know him then, do you know?

A. I haven't any idea. That would only be hearsay on [32] my part.

Q. Well, we have had a lot of that. Did your

(Testimony of Sydney M. Higgins.)

mother ever write and tell you how long she had known him?

A. Yes, I believe, but I have forgotten. It must have been a few months before I got back.

Q. Did Mr. Harrow live in San Diego?

A. He lived in San Diego and worked in San Diego.

Q. What kind of work did he do?

A. He was with a jewelry firm in San Diego.

Q. Was it Jessop's?           A. Jessop.

Q. What kind of work did he do?

A. I don't know.

Q. Well, was he a salesman or engraver or what?

A. I don't know. I never went into it, asked him about his work.

Q. Did your mother never tell you?

A. No. I wasn't curious about what he did.

Q. As far as you know, did he continue working at Jessop's?           A. When?

Q. Well, do you know if he ever ceased working at Jessop's?

A. When he married my mother, he ceased working.

Q. When he married your mother, he ceased working at [33] Jessop's?           A. Yes.

Q. Was that one of the stipulations to the marriage, that he cease working?

A. That I don't know.

Q. Your mother didn't confide in you to that extent?

(Testimony of Sydney M. Higgins.)

A. No, I don't think she would confide in me that way. I think she wanted companionship, and as I understood it, she didn't want him to work. She would rather have him around.

Q. During all this time from 1918 or 1919, when she first met Mr. Harrow, to the time when they were married in 1925, you were seeing your mother twice a year or thereabouts? A. Yes, I was.

Q. Would you come down to San Diego or would she come up to where you were living?

A. Both.

Q. Did you correspond with her very frequently at that time?

A. Yes, very frequently. Sometimes twice a week, sometimes only once a week.

Q. Did she confide in you that she was contemplating marriage? A. She did. [34]

Q. What was your reaction?

A. My personal reaction was extreme antagonism towards him. That was none of my business whom my mother married. I didn't think I should step in, because it would only make things all the worse, so I said nothing, although I didn't like the man, I never liked him. I never had any use for him. That is why I didn't see him.

Q. Did your mother consult you about the advisability of marriage, or anything else?

A. Yes, she did. She asked me whether she should marry him or not. I said she was my mother and certainly an adult and capable of making up

(Testimony of Sydney M. Higgins.)

her own mind, and it was up to her. If it was for her happiness, all right, it was up to her, not to me, to say.

Q. How old was Mr. Harrow at the time of the marriage, let us say in 1925?

A. Well, I understood he was 64 or 65, somewhere around there.

Q. Had your mother prior to her death been seriously ill at any time?

A. No, not particularly, not that I know. When I was a small boy she had pneumonia. That is the only time that I really knew that she was really ill. I think that was the first year I went to high school, just entering high school.

Q. Well, during the time—let's begin with the end [35] of the last war, 1918 or 1919; did your mother enter hospitals or sanitariums on occasions?

A. She went to the Paradise Valley Sanitarium.

Q. Is that the only one?

A. No, she went to, I believe it was sort of a rest home or something up in Pasadena, I believe it was.

Q. What was the purpose of her going to the rest home in Pasadena?

A. Well, I wanted her to live with me and she wouldn't do it, she said she would not live with any member of her family, and she didn't want to live in a hotel all alone, and there wasn't very much else she could do.

Q. Was she so old and feeble that she could not keep an apartment or small house?

(Testimony of Sydney M. Higgins.)

A. Yes, about in 1918, somewhere around there, she fell in the bathtub and threw her hip out. She was unable to walk very well. She had—I know when she lived in San Diego she had to have an apartment on the ground floor, because she couldn't get up and down stairs that way.

Q. So far as you know did she ever enter a hospital from 1918 forward?

A. She never entered a hospital. Paradise Valley Sanitarium, that is the only one she was in.

Q. You say she was not seriously ill?

A. No, she was never seriously ill. [36]

Q. What was the reason that she entered the sanitarium?

A. So she could get away from Mr. Harrow.

Q. Is that the only reason?

A. Yes, that was the only reason that I know of. She had become quite nervous through his——

Q. She really didn't need a nurse, then, did she, if all she was doing was getting away from her husband?

A. Well, she had quite a nervous time as the result of his hounding her all the time for money, so she went to the Paradise Valley Sanitarium.

Q. Well, did she have a nurse?

A. I suppose she did. I don't know.

Q. Don't you know?

A. Probably not, not all the time probably, just had an ordinary sort of nurse. She was not in bed.

Q. Do you know when she entered the sanitarium at National City?

(Testimony of Sydney M. Higgins.)

A. No, I have forgotten that.

Q. What? A. I don't recall that.

Q. She was there for several months, wasn't she?

A. Yes, she was there for several months.

Q. She was there for several months prior to the execution of this trust instrument, wasn't she? [37]

A. Yes, she was. If she had been really ill, I would have gone down to see her and take care of her.

Q. During the time subsequent to the execution of this trust agreement, now, or this trust document, the stipulated fact is that on numerous occasions your mother went to the court through counsel and asked for increased payments. Did you join her in those applications to the court?

A. I did, but they were not numerous. There were just two occasions.

Q. Well, in any ones that she filed, which are stipulated facts, you joined her, is that correct?

A. I did.

Q. How was that handled? Did you come down to San Diego or were the documents sent up to you for signature?

A. As I recall it, they were sent up to me and I had to go to a notary.

Q. Did you ever ask for an increased payment to yourself? A. Never.

Q. You were getting \$75.00 a month, I believe?

A. I was.

(Testimony of Sydney M. Higgins.)

Q. Did you need that money?

A. Did I need it?

Q. Yes. [38]

A. I wouldn't have accepted it if I hadn't needed it.

Q. Your income at that time then was such that you really needed that \$75.00 a month?

A. Yes, that was one reason.

Q. What was the other?

A. The other was that part of that money really belonged to my father, and on my father's death my sister and I did not claim it, and the reason that we really got the \$75.00 a month was, it was knowledge of my mother of that fact. In other words, we were really interested in it ourselves, and we wanted her to have it all, and we never made any claim. He died without any will, so she said that that in a measure belonged to us and she wanted us to participate in the income. Neither my sister nor myself asked my mother for the \$75.00 a month. It was voluntarily given by her.

Q. So that, to answer my question, as I understand your testimony now, it is that you accepted and received the \$75.00 first because you needed it, and second because, in fact, it was payment to you and your sister of what rightfully belonged to you out of your father's estate, is that it?

A. Yes. I had been quite ill myself, and that is why I needed the money.

Q. Did your mother ever write and tell you that she [39] was afraid of her husband, Mr. Harrow?

(Testimony of Sydney M. Higgins.)

A. She was afraid of him, yes, many times she did.

Q. Just what was she afraid of?

A. Well, for instance, he would take her past cemeteries, take her past hospitals, and he would say, "See, that is where I am going to put you. I am going to cause your death." It might seem fantastic, but that is exactly what he told her time and time again.

Q. Was she afraid that he might kill her?

A. I don't know. She never expressed any sort of a sentiment of that sort to me.

Q. Was she afraid of bodily injury?

A. No, I don't believe so.

Q. I didn't hear that.

A. I don't believe so. He was working on her purely in a mental capacity, not physically.

Q. Well, what about this mental condition of your mother. Was there ever any question of her standing, being able to stand up under this?

A. Well, that was—it was a continuous wearing process upon his part and naturally she resented it, and he worked on her all the time, so she just wanted to get away from him, and the only way she could get away from him was to go to the sanitarium or some place like that, seeing that she would not come to my home. [40]

Q. Was she ever treated by a psychiatrist?

A. Heavens no. There was no mental thing of that sort involved in the least. She was as sane to the date she died as anybody ever was.

(Testimony of Sydney M. Higgins.)

Q. I believe your testimony this morning was to the effect that on one occasion, at least, when your mother was in this sanitarium, she was able to walk downstairs and out to the garden. Was that something unusual, for your mother to be able to walk?

A. No, she could—she was on the second floor, as I recall it. She went from the second floor to the first floor by an elevator, and then there were a few steps down to the garden. As I stated before, she had thrown her hip out and it was extremely difficult for her to walk.

Q. Mr. Higgins, there had been quite a bit of testimony about efforts on Mr. Harrow's part in trying to drive your mother insane, and so I ask the question, whether there was ever any question about her ability to withstand these efforts on his part?

A. No, I don't think there was any question of her ability to do that if she wished to subject herself to that sort of thing. She did not wish to subject herself. It was a continuous process on his part. He did it all of the time.

Q. You got this, of course, through your mother?

A. That is what she told me, yes.

Q. Did she talk about it most every time you would see her?

A. Oh, usually.

Q. Did you ever try to verify whether it was fact or whether it was just a product of her imagination?

(Testimony of Sydney M. Higgins.)

A. No, I did verify it. I verified it with the medical staff at Paradise Sanitarium.

Q. What did you find out?

A. That she was telling the truth and she was not having any hallucinations at all. It was a fact.

Q. Do you remember the day on which the doctor called you from the sanitarium, that is, the day of the month?

A. No. I think it was in March.

Q. 1928? A. March of 1928.

Q. Do you know the day of the month?

A. No, it was the day before, naturally, that I arrived down here. I got down the next day, on that same day that I met Mr. Foerster, and I told him about the——

Q. Met him in San Diego?

A. It started after I had been in San Diego.

Q. We know the trust agreement was executed the 28th of March, so that if you can figure out how many days it was from the time you arrived down there to the date the [42] instrument was executed, we can probably get the approximate date.

A. It took about two days to—after I had been there about three days, it took about two days to draw up the rough draft.

Q. You never saw Harrow after you arrived down there on that occasion, did you?

A. Yes, I saw him once.

Q. You did?

A. He saw me first and he ran.

(Testimony of Sydney M. Higgins.)

Q. When was this?

A. I was sitting in there with the manager of the trust department of the then bank, the San Diego National Bank, and in his office, and he turned to me and he said, "I want you to look around. There is something very funny happening at the door." And then Harrow came in the door and saw me and he nearly broke his leg and arm getting out of the place before I could see him. Then I turned around and I saw him, and I never saw him after that.

Q. At that time Mr. Harrow and your mother were separated, weren't they?

A. She was in the sanitarium and he was—I don't know, he was living in an apartment house.

Q. And had ceased seeing her, they had reached the parting of their marital bonds and were expecting to obtain [43] a divorce, isn't that right?

A. No, he used to go out to see her.

Q. But he didn't come to see her after your arrived down there, did he?           A. No.

Q. He did stop seeing her at the time you arrived down there?

A. The day he hit her with a key was the last time he saw her.

Q. Do you know what date that was?

A. It was the day before I got down there.

Q. Did you ever execute an affidavit in connection with this case?

A. I didn't hear the question.

(Testimony of Sydney M. Higgins.)

Q. Did you ever execute an affidavit in connection with this case?

A. An affidavit? I don't know what it would be about.

Mr. Melville: I ask that this be marked for identification Respondent's Exhibit O.

(The document above-referred to was marked Respondent's Exhibit O for identification.)

Q. (By Mr. Melville): I show you a document which has been marked for identification as Respondent's Exhibit O, and call your [44] attention to the very last page and ask you if that is your signature? A. It is.

Q. Is this the signature of your attorney, Mr. Stone? A. Yes, I would say it is.

Q. Do you recall executing this document?

A. It was probably in connection with a request for additional income, wasn't it, to my mother?

Q. That was executed on the 23rd day of April, 1946, according to your notarial——

A. Oh, yes. After her death.

Q. Yes. A. Yes.

Q. Who prepared this document?

A. Mr. Stone prepared it.

Q. Do you know where he got the information that he put into it? Do you know where he got the information that he incorporated in this affidavit?

A. No, I haven't any idea.

(Testimony of Sydney M. Higgins.)

Q. Did he get it from you?

A. Well, I haven't read it through, so I am not prepared to answer that question right offhand.

Q. Didn't you read it at the time you signed it?

A. Naturally, I don't sign documents without reading [45] them.

Q. I am glad you said that. Was everything in this document true?

A. Well, if I said it was, it apparently is. I made an affidavit. I have not read the document again.

Q. I will lay it before you and you can read it. I am going to call your attention to a few paragraphs in it and ask you questions about them. In that second paragraph, Mr. Higgins, you stated that Mr. Harrow was using unbelievably fantastic and melodramatic means to try to drive her insane. Would you mind telling us what those fantastic and melodramatic means were?

A. Well, I have already told you he drove her past cemeteries and past hospitals and said, "That is where I am going to put you; that is where you are going to land; that is where you are going to be."

Q. Did he say how he was going to put her there?

A. Did he what?

Q. Did he say how he was going to put her there?

A. No, he never made that explanation, how he was going to put her there or why.

(Testimony of Sydney M. Higgins.)

Q. The next thing, even going so far as to demand from her while lying seriously ill in the hospital—I think you said awhile ago that she was never seriously ill.

A. I said she was in a very highly nervous state, so I [46] would say that was ill.

Q. Now, was she or wasn't she seriously ill?

A. His reaction toward her and hitting her in the face would certainly cause a very serious reaction in every way about that, and I would say the day after he hit her she was ill, yes.

Q. Seriously ill?

A. No doubt about it. She was ill.

Q. Seriously ill?

A. I am not a doctor. I don't know.

Q. I am just trying to reconcile your testimony before with this affidavit.

A. I would say that she was ill. When I saw her, she certainly was ill, and it was due particularly to the reaction from these efforts, throwing the keys at her and hitting her in the face. Up to that time shew as confined to the——

Q. And this hospital you mentioned here, you of course meant it was a sanitarium?

A. Yes, sir, it was the Paradise Valley Sanitarium. It is more a rest home, I guess that is the word. She was trying to rest from him.

Q. Calling your attention the next paragraph, the one beginning near the bottom of the page, the trustor expressed her intention to and by instruct-

(Testimony of Sydney M. Higgins.)

ing the bank and her said attorney by such declaration of trust did divest [47] herself of the property in an irrevocable trust so that the property could not be subject to Federal taxes. Tell us about the conversations that took place with respect to Federal taxes.

A. That was merely a side issue; I was told by the——

Q. I didn't ask what kind of an issue it was. I am asking for the conversation.

A. Conversation about what?

Q. Well, were you ever present when your mother made the inquiry of an attorney with respect to whether this would be subject to Federal taxes?

A. I was there, but she didn't make that inquiry.

Q. When you say you were there, where were you?

A. I was in her room at the Paradise Valley Sanitarium. I don't remember the room number.

Q. Is that the first time that she talked to the attorney about it?

A. Well, that was the first time he went out there, he went with me.

Q. The trust was in completed form?

A. It was in completed form ready for her to sign.

Q. And she never talked to the attorney before the trust was drawn up?

(Testimony of Sydney M. Higgins.)

A. No, that was the first time he had ever been out there. [48]

Q. Had she been down to see him?

A. No.

Q. So that the information that he had was what you could give, is that correct?

A. She would have no occasion to see the attorney, because this other thing happened, this had taken place already, and if it had not been for that there would not have been any occasion for his—I think the main reason for his hitting her was she refused to sign these papers divesting herself of all her property. That was one part of the thing.

Q. We will get along a little bit faster if you will just answer the questions and not get into any arguments. A. Very well.

Q. You are a beneficiary of this estate, aren't you? A. I am.

Q. All right. I am trying to go back to the conversations leading up to the execution of this trust instrument. Did you discuss with your mother the matter of executing the trust instrument before you talked to the attorney? A. Yes.

Q. And then when you went to the attorney you conveyed her wishes to him, is that correct?

A. That is correct.

Q. And then when you went out to her, the trust [49] instrument was all in final form for signature?

A. It was.

Q. Was any change made after she looked at it before she signed it? A. None at all.

(Testimony of Sydney M. Higgins.)

Q. In other words, the attorney, through your instructions, was able to comply exactly with her wishes in the matter at the first attempt?

A. Entirely.

Q. With whom, then, did she—first, did she tell you anything about her desires in connection with estate taxes?

A. No, she didn't mention the taxes.

Q. She didn't?           A. Not at any time.

Q. Did you when you talked to the attorney about the trust mention taxes?

A. No, he just happened to mention after it was drawn up, he said, "This can be a saving in Federal taxes," but that was not the reason that it was drawn up.

Q. I call your attention now to this paragraph: "The trustor expressed her intention of and by instructing the bank and her said attorney by said declaration of trust did divest herself of the property in an irrevocable trust so that the property could not be subject to Federal taxes." [50] Now, to whom did she express her intention so that the property could not be subject to Federal taxes?

A. She didn't express her intention in that regard.

Q. So that your affidavit in that regard is false, is that right?

A. He said that it was originally made—

Q. I am asking you, your affidavit is either true or false, which is it?

(Testimony of Sydney M. Higgins.)

Mr. Stone: We object. That is argumentative. The instrument speaks for itself.

Mr. Melville: I think the Court is entitled to know whether it is a true statement or whether it is not.

The Court: Overruled.

By Mr. Melville:

Q. Answer the question. Is that statement in the affidavit true or false? A. Partially true.

Q. And partially false?

A. No, I wouldn't say it was partially false.

Q. It is either true or false, isn't it?

A. She did not make that trust to avoid Federal taxes.

Q. I didn't say that. I want to know if your statement in that affidavit which you at one time swore was true, is true? [51]

A. Well, she did not make that to avoid the payment of Federal taxes.

Q. I didn't ask that. I asked you if your statement in that affidavit is true or false?

A. I said it is partially.

Q. Partially what? It is false, isn't it?

A. No, I wouldn't say so.

Q. It is partially false, isn't it? Isn't it? Isn't it? A. Partially false?

Q. Yes. A. Well, possibly it is.

Q. It is, isn't it, false in part?

A. In part?

Q. In part, yes. Was it in part?

(Testimony of Sydney M. Higgins.)

A. Yes. It was not made with that intention at all.

Q. I want you to tell this Court whether that statement is true or false.

Mr. Stone: Again I object to this examination as being argumentative and incompetent. This statement shows plainly he is alleging matters of belief, and so forth. It does not refer to an irrevocable trust. It is clear on its face and it is unfair to attempt to force the witness to say something that has been answered time and time again.

The Court: I think this witness can take care of [52] himself. Overruled.

By Mr. Melville:

Q. Mr. Higgins, I just want to know what the facts are in this case, and if you have made an erroneous false affidavit before, I think it ought to come out. If you have not made a false affidavit before, I think you ought to testify to the same effect today. We are looking at the same paragraph, aren't we? A. Yes, right here.

Q. And that first sentence in that paragraph, "Trustor expressed her intention to and by instructing the bank and her said attorney by said declaration of trust did divest herself of the property in an irrevocable trust so that the property could not be subject to Federal Taxes." Now, you made that statement in an affidavit which you executed before a notary public in April, 1946. Were you telling the truth then?

(Testimony of Sydney M. Higgins.)

A. Well, that was an erroneous——

Q. Just answer that question yes or no. Were you telling the truth then when you made that statement in your affidavit? You can answer that yes or no, and you can explain later. Were you telling the truth then?

A. I probably didn't read that correctly.

Mr. Melville: Your Honor, may I ask that the Court instruct the witness to answer my question yes or no [53] without qualification?

The Court: I won't instruct him to answer yes or no, but I will instruct him to answer the question.

Do you understand the question?

The Witness: Yes, your Honor, I understand the question, but it would appear that he is trying to incriminate me in some way when that was not so.

The Court: Now, you can answer that question, can't you, whether that statement was true or false at the time it was made?

The Witness: She didn't make it that way to avoid taxes.

The Court: Well, you said she did. Was that statement true or false?

The Witness: If I said she didn't, now, it was not correct, I will admit, yes.

By Mr. Melville:

Q. This affidavit then is not true, this sentence which I just read, then, is false, is that correct?

A. Yes.

(Testimony of Sydney M. Higgins.)

Q. Now, Mr. Higgins, would you mind telling the Court why you made a false statement in your affidavit?

A. Well, as I say, that is probably one of those times when I signed something and didn't read it.

Q. You didn't read this one? [54]

A. I didn't read it as carefully as I should, because she did not make that—I am under oath to tell the truth, and I am telling you the truth, and she did not make that trust for that reason. It was made for the sole purpose of getting her property beyond the reach of Harrow, and this tax came as only the aftermath, it was only mentioned to her, it was mentioned by the attorney to her and also the manager of the trust department of the Bank of Italy. He said, as I recall, he said, "You know that she no longer owns the property, she can't control it, has nothing to say about it at all, it is not hers but the property of the bank; she has conveyed it to the bank, and whether you know it or not, it so happens that it is not subject to Federal tax."

Now, that is the absolute truth of the whole thing.

Q. Mr. Higgins, do you know the purpose for which this affidavit was executed by you?

A. No, I don't know.

Q. You are the executor of the——

A. I was the administrator.

Q. ——administrator of the estate?

A. Yes.

Q. Do you know that a tax controversy was

(Testimony of Sydney M. Higgins.)

pending with the Federal Government at the time that you executed this affidavit?

A. I heard that there was some difficulty or some [55] claim of the Federal Government.

Q. But you didn't know that this affidavit was being executed to present to the Federal Government in connection with that?

A. I knew it had something to do with that, probably.

Q. Where were you when you executed this?

A. I was up in San Anselmo.

Q. You were where?

A. I think I was in San Anselmo.

Q. Was Mr. Stone up there at that time?

A. Was I what?

Q. Was Mr. Stone up there at that time?

A. I would like to withdraw that. I must have been down in—I must have been in San Diego.

Q. Were you in Mr. Stone's office when you executed this?

A. I absolutely don't—now, I don't recall. There were so many of these things going on all the time that I had to sign, and I had to make numerous trips back and forth. I don't recall whether I was in Stone's office or whether he sent it up north.

Q. Well, the notarial statement at the bottom says, "Subscribed and sworn to before me," and is signed by Mr. Stone.

A. I think it was in San Diego. I think, as I

(Testimony of Sydney M. Higgins.)

recall [56] it, we went to a notary in the same building in which Mr. Stone's office is located.

Q. Wasn't Mr. Stone the notary?

A. Was he what?

Q. Wasn't Mr. Stone the notary himself? Before whom you executed this document?

A. I don't know. I remember one time——

Q. Look at it. You have got it before you.

A. All right. He is the notary, then, if that is what it says.

Q. In other words, you swore to this before Mr. Stone as the notary public?

A. Yes, if he is the notary public, I did.

Q. He is your attorney for the estate, isn't he?

A. Yes.

Q. And you want this Court to get the impression that you didn't know why you were executing this affidavit?      A. No, not at all.

Q. All right; then tell the Court why you executed the affidavit.

A. He explained to me, as I recall, that it had something to do with the tax controversy, probably.

Q. Probably?      A. Yes. I don't know.

Q. Could it have anything to do with anything else in [57] the world?

A. Well, it might have been with the accounting for the state or somebody. I don't know.

Q. You just got through saying that you were not sure why this affidavit was executed.

A. No, I am not positive.

(Testimony of Sydney M. Higgins.)

Q. Let me call your attention to the last paragraph, which says: "This affidavit is a true statement of facts I will testify to if called as a witness in the matter of the assessment of Federal estate tax on the March 24, 1938, trust of Dell Hinds Higgins." A. Yes.

Q. Now, did you have that idea at that time you signed the affidavit? A. No.

Q. Why are you changing your testimony, then?

A. Because I hadn't read the last paragraph until you called it to my attention.

Q. Why did you make the false statement in the third paragraph of the first page?

Mr. Stone: I object to that as an improper question, the same one we have been——

The Court: Overruled. This witness has admitted that it is a false statement.

Mr. Stone: I can't agree to that. He has admitted what counsel has said was the meaning of that [58] sentence was a false statement, but that is not what the sentence says. It says it was an irrevocable trust so that the property could not be subject to Federal tax. It doesn't say that she told him to make it so it would not be subject to Federal tax.

The Court: You may ask this witness when he read that affidavit after you prepared it whether he was aware of the very careful distinction that you are drawing now between one thing and another. This witness got the same impression from that, undoubtedly, when he said that as he put it

(Testimony of Sydney M. Higgins.)

when he read it that the statement meant to him that she was making this trust in order to avoid Federal estate taxes. He says now she did not make the trust for that purpose, and therefore the statement in this affidavit is incorrect. Now, he has already said that, and so when counsel says, "Why did you make that incorrect statement?", I don't see that he is drawing any conclusion. That is certainly what he testified to. Overruled.

Mr. Stone: It seems to me if the Court would read that himself and have it in front of him he would have the same conclusion that Mr. Higgins had at the time.

Mr. Melville: I am not trying to keep anything from your knowledge, and I ask the Court to read this third paragraph:

The Court: It is not for me to say. It is Mr. [59] Higgins' testimony which is being taken, and it is up to him to read this paper. I will take a recess now and give him ten minutes to read the affidavit to be sure he understands it.

Mr. Melville: I don't want him to read it with his counsel. I propose if we are going to take a recess and the judge retire to his chambers, that the witness stay on the stand. I don't want him to confer with his counsel.

The Court: I think that is a reasonable suggestion. Do you want some time to reread that affidavit, Mr. Higgins?

The Witness: I can read it, your Honor, in just a minute here. I won't have to take your time.

(Testimony of Sydney M. Higgins.)

Mr. Melville: As a matter of fact, I read every paragraph to him.

The Court: I don't want any implication here that this witness is being taken advantage of, or anything like that, so if there is any doubt of his understanding, I want him to have all the time necessary. If you want a minute, you can have a minute, and if you want ten minutes, you can have ten minutes.

Mr. Reporter, you will let the record show that we pause while the witness is rereading the affidavit.

The Witness: I believe I understand the substance of it, your Honor. [60]

The Court: Very well. Proceed, please.

Mr. Melville: May the reporter read the last question, please?

(The question was read.)

The Witness: Why did I make it?

By Mr. Melville:

Q. Yes, why did you make that false statement?

A. I haven't the faintest idea. Whatever it is, it was purely unintentional.

Q. Why did you say in the very last paragraph of the affidavit that if called as a witness that you would testify to these statements, and now you are testifying to the contrary? What has transpired between the time that you executed this affidavit in April of 1946 and the present time to cause you to change your testimony? A. Why, nothing.

Q. Then why, when you said in your affidavit

(Testimony of Sydney M. Higgins.)

that you would testify according to these facts which are set forth in that affidavit, why don't you testify to them?

A. I really don't know. That trust was made for just one purpose, and I testified why it was made and I stand by my testimony through anything that comes.

Q. But you won't stand by your affidavit?

A. I didn't read it carefully enough, apparently.

Q. Calling your attention to the first full paragraph [61] on the second page, which reads as follows: "That in preparation of the trust agreement there was discussed by affiant, his mother, his sister and his mother's attorney, Mr. Cobb, the making of the trust absolutely irrevocable in order that there should be no Federal estate tax charged against it, and so said attorney prepared the trust under the law then in force and advised his client that said will would not be subject to said tax."

You have read that now, have you?

A. You said what?

Q. You have read that with me, have you?

A. I have read it.

Q. I correctly read it, did I not?

A. That is correctly read.

Q. All right, let's analyze it. Do you say there was discussion by you, your mother, your sister, and your mother's attorney, Mr. Cobb? Where did that conversation take place?

A. My mother—myself, my mother and Mr. Cobb

(Testimony of Sydney M. Higgins.)

were at the hospital, that is, at the Paradise Valley Sanitarium, in her room.

Q. Wasn't your sister there?

A. I don't recall that.

Q. Well, the affidavit says that you and your mother and your sister and your mother's attorney, Mr. Cobb, had a discussion. You say that discussion took place in your [62] mother's room?

A. Yes.

Q. And that was in connection with the preparation of the trust agreement?      A. Yes.

Q. Or the execution of it.

A. No, the execution of it.

Q. The paragraph says in the preparation. Which was it?

A. It was the execution. He only went out there once when it was all ready. I discussed the preparation with her.

Q. Then what does it mean here, if this discussion was in connection with the execution of it instead of the preparation of it, why did you say that you discussed the making of the trust absolutely irrevocable in order that there should be no Federal estate tax charged against it? Would not such a conversation necessarily have to precede the preparation of it?

A. Well, that was not the reason it was irrevocable. That was not why the trust was made irrevocable.

Q. Well, I want to know whether this conversa-

(Testimony of Sydney M. Higgins.)

tion that you refer to now in this paragraph took place before the trust instrument was prepared, and if the attorney pursuant to this discussion prepared it in accordance with the [63] discussion.

A. I think he was only out there once. I think he was only out there once.

Q. Are you sure of that?

A. Not absolutely positive. I don't remember now.

Q. Does this paragraph refresh your memory? This was executed over a year ago. At that time your memory presumably was just as good, if not better, than it is today. At that time you said there was a discussion which apparently preceded the execution of this instrument.

A. I discussed it with her.

Q. Was Mr. Cobb present?

A. I don't think he was. I would not swear to it.

Q. Was your sister present?

A. I don't know. I did talk it over at the time in San Diego. I told her about the terms of that, of the trust, of the proposed trust, and at that time I am positive nothing was said about Federal estate taxes, not a word.

Q. I call your attention to the next to the last line in that paragraph and the use of the word "will." What will were you talking about? It is to the effect that at that time "said attorney prepared a trust under the law then in force and advised his client that said will would not be subject to said tax."

(Testimony of Sydney M. Higgins.)

A. I don't know. Is a trust a will? I don't know. [64] I am not an attorney. I don't know.

Q. Did your attorney prepare this?

A. He signed it. He prepared it.

Q. Did your attorney prepare this, or did you prepare it?

A. I did not prepare it. I am not a lawyer. I couldn't prepare it.

Q. Do you know who prepared this affidavit?

A. No, I don't know. I am not a lawyer. I could not prepare such a thing. I would not know how to do it.

Q. But you did read this before you executed it. What did you think was meant by the word "will"?

A. I didn't think about it.

Q. All right.

The Court: How much longer do you expect to be on cross examination?

Mr. Melville: I think I am almost through, your Honor.

By Mr. Melville:

Q. Somewhere in this affidavit, it is in the first paragraph on the last page, you refer to the stopping of the salary of \$70.00 per month to the trustor as a vice-president of an estate corporation. What was the estate corporation that you referred to?

A. In Seattle, Washington, there was a building that [65] was owned by my mother and her two sisters, and it was incorporated, and that was—the estate was called the Hinds Estate, Incorporated.

(Testimony of Sydney M. Higgins.)

Q. Was that a building that your mother and her sisters received from the estate of some deceased relative?

A. From their mother and father.

Q. That is Mr. and Mrs. Hinds?

A. Well, originally it was Hinds, then my grandmother—I mean my grandfather died and my grandmother married a Captain Marshall, but it went originally back to the Hinds. That is my mother's maiden name.

Q. The answer to my question then, the estate corporation means that it was a corporation which the estate formed at one time to operate this building, is that correct?

A. Yes, that was what it was.

Q. Isn't it a fact, Mr. Higgins, that Mr. Harrow sued your mother for divorce?

A. He sued her for divorce.

Q. Yes; and the divorce was granted to him?

A. It was granted to him.

Q. Are you familiar with the pleadings and the grounds that he alleged?

A. Absolutely none. I have never saw the transcript or read it, or I was never told about it.

Q. What discussions were had with your mother and [66] her attorney about providing for the funeral expenses, that they should be paid out of the corpus of the trust? Do you recall anything like that?

A. When we went over all these items together, I didn't know that was one of the things that would

(Testimony of Sydney M. Higgins.)

be taken, would be paid out of the corpus of the trust.

Q. Why did he provide for it in the trust? You must have issued instructions to him to do it, didn't you?

A. No, I wouldn't know anything about things like that.

Q. Did he receive any instructions from your mother before he prepared this?

A. No, no. The only instructions which my mother gave me were to draw up this trust so that she could have all her property removed from her control so that neither she nor he could get hold of any, and all of these technicalities were put in afterwards by the attorney.

Q. You include such things as funeral expenses as one of the technicalities you are referring to?

A. Yes. I know nothing about trusts, not anything like that. I am not an attorney.

Q. Wasn't there some discussion had about whether it was advisable to provide for funeral expenses out of the corpus?

A. No, it was written here, and as I recall, he said [67] it was always done that way.

Q. Isn't it a fact, Mr. Higgins, that even before the execution of this trust your mother had the bank instructed to not handle any of her accounts except through their trust department?

A. You mean preceding this?

Q. Yes.

(Testimony of Sydney M. Higgins.)

A. Not that I know of. If she had, I never heard about it. Incidentally, her one great objection to signing this was she didn't want to give up the control of her property, because she said the only reason to circumvent Harrow was to take the most drastic possible action, and that is exactly the only reason she did this, she didn't want to give up her control of her property at all, she objected to it, but she said she knew this was the thing, no other way that would protect the property, no other way to do it, and that is why she was willing to sign it.

Q. Did her attorney tell her that she need not make the trust irrevocable and that after the divorce was granted then she would have all her property back?

A. At the time that this trust was executed, there wasn't any question of divorce.

The Court: There wasn't?

The Witness: No; that came afterward. [68]

By Mr. Melville:

Q. Your mother and Mr. Harrow were already separated, weren't they?

A. No, they were not separated.

Q. They were not?

A. No, she was living at the sanitarium and he was at an apartment house, but he was coming to see her all the time.

Q. Did you know that when he filed suit for divorce he alleged that they were separated?

A. No, I never even knew that at all. I never

(Testimony of Sydney M. Higgins.)

was told anything about it and I knew nothing whatsoever about the divorce.

Q. Did your mother ever confide in you to the extent of telling you what steps she took to keep Mr. Harrow from getting her money?

A. No, she asked me what could be done when I came down there.

Q. I mean, before you came down?

A. No, never did. She said he was trying to get her money from her all the time, but she didn't know what to do to prevent it.

The Court: We will take a ten-minute recess.

(Short recess taken.)

The Court: Proceed. [69]

By Mr. Melville:

Q. Mr. Higgins, I believe you have already testified you were one of the principal beneficiaries of your mother's estate? A. Only as to income.

Q. Only as to income?

A. Yes. I don't get any of the property when I am alive. I don't inherit any of the corpus while I am alive.

Q. You don't? A. Only the income.

Q. Who does inherit the corpus from this estate?

A. My share goes to my three children.

Q. To your three children, so that your three children are the ones that will benefit from any tax saving in this case, is that correct?

A. Well, wouldn't they have to pay the tax any-

(Testimony of Sydney M. Higgins.)

way? Of course, I am asking you the question now. As I interpret it, they have to pay the tax.

Q. Your children you mean?

A. My children, because I don't have the property.

Mr. Melville: The respondent offers in evidence the affidavit of Mr. Higgins which has previously been marked for identification as Exhibit O. Any objection?

Mr. Stone: No.

The Court: It will be received and marked in [70] evidence.

(The document heretofore marked Respondent's Exhibit O was received in evidence.)

Mr. Melville: No more questions.

#### Redirect Examination

By Mr. Stone:

Q. I have just two questions. During the discussion between you and your mother and your attorney at various times in March 1928, did you discuss the question of the trust with your sister at all?

A. Discuss——

Q. The question of making the trust, did you discuss that with your sister?

A. I don't recall that. I don't think she was down there. I don't know.

Q. Did you write to her or telephone to her or have any communication with her with regard to it?

A. Not that I recall. The time element entered into it.

(Testimony of Sydney M. Higgins.)

Q. You testified early in the afternoon that at one time your mother was in a rest home at Pasadena. Can you tell about what year that was?

A. Oh, it was three to four years before that, I think.

Q. Before what? [71]

A. Before this, before this trust was made.

Q. Was it before she was married to Harrow or after?

A. I was just trying to recall. No, I don't think she was ever in any home when she was married to Mr. Harrow. In fact, I am positive of that. She was never there, I am positive of that.

Mr. Stone: That is all.

#### Recross Examination

By Mr. Melville:

Q. So that at least when she went to the rest home in Pasadena, she was not doing that to get away from Mr. Harrow, is that right?

A. That had nothing to do with Mr. Harrow.

Mr. Melville: All right. No more questions.

Mr. Stone: That is all. Mrs. Kendall, please.

The Court: Just a minute. There is a part of this that I am still not clear about. Can you hear me, Mr. Higgins?

The Witness: Yes, sir; I can hear you.

The Court: You remember in referring to this affidavit, which is Respondent's Exhibit O, Mr. Melville asked you when it was that your mother was seriously ill, and I want to see if my memory is

(Testimony of Sydney M. Higgins.)

right about this. As I recall it, you said that you were referring to the occasion after she had been hit with the keys that she was in a nervous [72] condition and was in the hospital.

The Witness: Yes, sir; that was it.

The Court: Now, after that did Mr. Harrow ever see your mother?

The Witness: I don't believe so, your Honor. I don't think so because she was immediately improved.

The Court: You say here, even going so far, referring to Mr. Harrow, as to demand from her while lying seriously ill in the hospital that she convey the property to him. You mean, I suppose by that, that he demanded it from her, is that right?

The Witness: He demanded it from her.

The Court: While she was seriously ill.

The Witness: While she was at the hospital. She was in a nervous condition.

The Court: What did you mean by those words, "seriously ill"? Did you mean after she had been hit with the keys, or before?

The Witness: She had quite a severe nervous condition before that, but she was not physically sick.

The Court: I am asking you what you meant by saying that. I will ask you to look at this again and read it, by saying that when she was seriously ill in the hospital he made these demands on her.

(Testimony of Sydney M. Higgins.)

The Witness: Well, I think she was seriously ill [73] in a nervous way. It reacted on her.

Mr. Melville: I can't hear the witness.

The Court: Yes; will you speak up, please?

The Witness: Yes. I would say that she was seriously ill and I don't think it is stretching the point. She was in a highly nervous state from this man's actions.

The Court: Was that before she was hit with the keys?

The Witness: Yes, sir, it was before.

The Court: And is that what you meant in your affidavit when you were talking about her being seriously ill?

The Witness: At that time I meant that, I meant, I mean it was aggravated considerably after the time. She was well and had to go back to bed. She had been up and had been walking around and going into the garden, and all that sort of thing.

The Court: Now, Mr. Higgins, I want you to take your time to answer these questions and give me some answers that you can really stand back of. I am asking you what you meant in your affidavit when you said that she was seriously ill in the hospital. Was that before or after she was hit with the keys?

The Witness: That was before.

The Court: That was before; that is what you [74] meant?

The Witness: That is what I meant.

(Testimony of Sydney M. Higgins.)

The Court: So if you said earlier in your testimony that you meant after she was hit with the keys by saying that she was seriously ill, that was a mistake, you didn't mean that, is that right?

The Witness: Well, I meant it in this way, I can put it fully, too, your Honor——

The Court: If you will read the affidavit you will see that you say while she was seriously ill he made demands on her.

The Witness: Yes, I meant that. That was the truth. She was seriously ill.

The Court: She was seriously ill before she was hit with the keys?

The Witness: Before she was hit with the keys.

The Court: And that is what you are referring to here in this affidavit?

The Witness: In this affidavit.

The Court: How long was she seriously ill?

The Witness: That is very hard. It is a long time ago. I would say that she had been down there several months.

The Court: How long? Can you fix the date approximately? [75]

The Witness: No, your Honor, but she was in San Francisco in the fall before this in 1927.

The Court: Let me see if it will help you to get the date of this trust. The date of this trust was March 1928, is that right?

Mr. Stone: March 24, 1928.

The Court: March 24, 1928. How long before that did she go to the hospital?

(Testimony of Sydney M. Higgins.)

The Witness: She went about January, somewhere around February.

The Court: February 1928?

The Witness: As near as I can recall.

The Court: How long did she stay in the hospital?

The Witness: She stayed in there, it was only a few weeks after the trust was made that she left there. She improved very, very fast when that was made.

The Court: But at the time the trust was made she was seriously ill?

The Witness: She was; yes, sir.

The Court: And if anything, she was in an aggravated condition because of this key incident, is that right?

The Witness: Because of the key incident and the determination——

The Court: How many days before the execution of the trust instrument did that key incident take place? [76] In other words, how long did it take you to consult this lawyer and have a trust prepared for her to sign it?

The Witness: It took me one day to get down, that was one day; the second day I was there. The second day I came in town because I had to call up long distance.

The Court: Will you speak up?

The Witness: I was called up in the evening that this act had taken place that afternoon, so I

(Testimony of Sydney M. Higgins.)

started right down the next day, and then after I talked to my mother I went in town and, that is, when I ran across Mr. Foerster, the attorney, on the street, and I went to his office, and he started right in that evening, worked that evening with this lawyer drafting, and I think we spent about two days negotiating with the Bank of Italy, and to get it all in preparation, I would say about five days had elapsed.

The Court: It was done very quickly?

The Witness: Yes.

The Court: There were about five days between this key incident and the time that your mother signed the trust instrument?

The Witness: Signed the trust.

The Court: During that time would you say that she was seriously ill?

The Witness: I would, your Honor, yes.

The Court: I have no further questions. [77]

By Mr. Melville:

Q. Mr. Higgins, early in my cross examination of you I asked the question whether your mother was ever seriously ill, and do you remember what you replied? A. Yes. I said no.

Q. You said then that she was never seriously ill, is that right. A. Yes.

Q. Now, that was not the truth, was it?

A. There are degrees of seriousness.

Q. Do you remember whether I asked you the question, was your mother ever seriously ill?

(Testimony of Sydney M. Higgins.)

A. Yes, I recall your words.

Q. You recall the question. Do you remember what your answer was?

A. That she had pneumonia once, yes.

Q. Do you remember whether you testified that she was never seriously ill?

A. She was seriously ill that once, very, very, almost died with pneumonia. There are degrees of things.

Q. Let's put it this way: If in your previous testimony you testified that she was never seriously ill, if you testified to that effect, do you now testify that that testimony was wrong?

A. No, what I meant the first time was, when she had [78] pneumonia she was almost mortally ill, very, very sick woman, and this time she had been and she was seriously ill. Lots of people are seriously ill.

Mr. Melville: No more questions.

Mr. Stone: That is all; no more.

The Court: All right.

(Witness excused.)

Mr. Stone: I will call Mrs. Kendall.

Whereupon,

HELEN B. KENDALL

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Mrs. Helen B. Kendall.

Direct Examination

By Mr. Stone:

Q. How old are you, Mrs. Kendall? A. 53.

Q. You are considerably younger than your brother, Sydney? A. Yes.

Q. You are his brother?

A. I am his sister.

Q. His sister; excuse me. And the daughter of Mrs. [79] Dell Hinds Higgins? A. Yes.

Q. Where do you live? A. In Altadena.

Q. That is near Los Angeles, is it?

A. Near Pasadena.

Q. How long have you lived here in Altadena?

A. I have lived there for almost 28 years.

Q. Did you see your mother during that period?

A. Yes, I did.

Q. How frequently?

A. Many times. I used to go down to visit her. I used to go to visit her.

Q. How often?

A. Oh, maybe once in two weeks, or once a month, or something like that.

Q. Did you know anything about the trust that was made in March 1928, before it was signed on the 24th of March?

(Testimony of Helen B. Kendall.)

A. There had been a discussion of it and then when it was signed, of course, I had to sign the papers, too, because I was implicated in the trust as well as my brother.

Q. With whom did you discuss it prior to the making of the trust?

A. Well, with nobody, because I was in Altadena. It would be just my brother who would call me up or would have [80] written to me.

Q. But you did know about the trust and what was being done? A. Oh, yes, yes; I knew.

Q. And you did sign it? A. Yes, sir.

Q. It was dated the 24th of March, 1928. Had you seen your mother in the Paradise Valley Sanitarium before that time within a month or two?

A. Oh, yes; I would see her many times before.

Q. How often?

A. Maybe once in a couple of weeks, or once a month.

Q. What was her condition, mentally and physically, the last time you saw her before the trust was made?

A. She was very, very nervous from going through the—Mr. Harrow's actions, she naturally was very nervous.

Q. Did she have any physical ailment?

A. No, no real physical ailment.

Q. When was the next time you saw her after the trust was made?

A. I just wouldn't remember that, Mr. Stone.

(Testimony of Helen B. Kendall.)

Q. Do you know anything about Mr. Harrow's treatment of your mother during the time they were married?

A. Yes, because she would talk to me when I would see her and tell me, or else she would write to me. After [81] writing, of course, she was very agitated in those letters, I would come down to try to calm her.

Q. At the time the trust was made, was she seriously ill so that there was any thought in her mind of death?

Mr. Melville: Just a minute, Mrs. Witness. Unless the counsel for the petitioner can show how this witness could pry into the mind of her mother and determine what was there, I don't think she has shown her qualification to answer that question and I object to it on that ground.

The Court: You may qualify her, Mr. Stone.

Mr. Stone: Yes, I will examine her further.

By Mr. Stone:

Q. Did you ever discuss with your mother her physical condition shortly before this trust was made?

A. Yes, she said she was very nervous before the trust was made due to Mr. Harrow's actions, that is enough to make anybody nervous.

Q. Did you talk to her at all about the making of the trust?      A. No, I didn't until later.

Q. What do you mean later?

A. Well, after my brother had discussed it with

(Testimony of Helen B. Kendall.)

her, then I came down and we talked it over after that.

Q. Did she make any mention of impending death on any of those occasions? [82]

A. Absolutely no, never even thought of it, none of us did.

Q. Did she look or act as if she was near death?

A. No, no, she didn't.

Q. Make any expression that she was thinking of death?

A. Not one expression. None of us ever discussed anything like that, never thought of it.

Q. Did she ever tell you why she was making the trust?

A. Yes. She said she wanted to make it to keep Mr. Harrow from getting all of her money away from her.

Q. Did she ever tell you anything that he had done looking towards getting the money away from her?

A. He would try to make her sign checks away to him.

Q. Do you know of any money being paid to Mr. Harrow at or about the time the trust was made?

A. Mr. Harrow was paid \$5,000.00 so that we could get him out of the family in a hurry.

Q. Do you know when that \$5,000.00 was paid to him?

A. Yes; it was paid on April 2nd, 1928.

Q. Where did you get that date?

(Testimony of Helen B. Kendall.)

A. Out of my mother's savings book.

Mr. Stone: Mark that for identification No. 15.

(The document above-referred to was marked  
Petitioner's Exhibit No. 15 for identification.)

By Mr. Stone:

Q. I show you savings book. Is that the one you referred to?

A. Yes, that is the one, Mr. Stone.

Q. In the Southern Trust & Commerce Bank of San Diego?

A. San Diego, yes.

Q. Where did you get the book?

A. Mother left some trunks to me in her will, and they were amongst her private papers in the trunk.

Q. And it has been in your possession since her death, then?

A. Yes, it has been there all the time. I just found it recently.

Q. Do you know that to be her savings account book?

A. Yes, I know, because I have been in that bank with mother when I visited her. I know she went there.

Mr. Stone: I would like to offer this book in evidence as Exhibit 15.

Mr. Melville: No objection.

The Court: It will be received and marked in evidence.

(The document heretofore marked Petitioner's Exhibit No. 15 was received in evidence.)

(Testimony of Helen B. Kendall.)

Mr. Stone: I call attention to the entry on April 2nd, 1928 of withdrawal of \$5,000.00, and the entry [84] on April 2nd, 1928, of the withdrawal of \$15,000.00, and the entry of the withdrawal on April 3, 1928, of the balance of the account of \$418.51. May it be agreed that the exhibit may be withdrawn by substituting a photostatic copy? We might need it for preparation of the brief.

Mr. Melville: No objection.

The Court: That may be done.

Mr. Melville: May I suggest, your Honor, that there are just a few entries in the book that will have any materiality to our case, and we can read them in the record in about a half a minute.

The Court: Well, I would rather leave it this way.

By Mr. Stone:

Q. Do you know anything about the grounds of the divorce that was filed by Mr. Harrow against your mother?

A. Well, he said that it was all over controversial matters due to finance.

Q. Mr. Harrow? A. Mr. Harrow, yes.

Mr. Stone: May I have the complaint in divorce in the case of Harrow versus Harrow marked for identification No. 16?

Mr. Melville: No need to mark it for identification. [85]

The Court: If there isn't going to be any question about it.

(Testimony of Helen B. Kendall.)

Mr. Stone: I would offer the complaint in divorce in Harrow versus Harrow in evidence in this case.

Mr. Melville: Your Honor, I take opposing counsel's statement for the fact that this is a true copy of the complaint in divorce. There is no question about the authenticity of it. I would like to ask counsel, however, to state the purpose of his offer.

Mr. Stone: The reason is to show we have in Court here evidence of what was the reason for the differences between Mr. and Mrs. Harrow, on the part of Mrs. Harrow. This is competent to show Mr. Harrow's idea of what was the differences between them, which were settled by making the trust.

Mr. Melville: Will you stipulate that everything that Mr. Harrow says in that is true?

Mr. Stone: I know nothing about it.

Mr. Melville: Then I can't see that it has any materiality, your Honor.

Mr. Stone: This is a certified copy certified by the Clerk of the Court of the complaint on file in the Superior Court of San Diego County.

The Court: It can't do you any damage, can it, Mr. Melville? You have seen these papers, haven't you? [86]

Mr. Melville: Oh, yes.

Mr. Stone: He has a copy of it.

Mr. Melville: I would like to have that in the record for some purpose there. As a matter of fact,

(Testimony of Helen B. Kendall.)

there is something in there that I would like to have in.

The Court: Well, I should think you would be willing to let it go in.

Mr. Melville: Well, all right. I will withdraw my objection.

The Court: It will be received and marked.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 16.)

Mr. Melville: Will you stipulate with me that the statements that are therein made were made by Mr. Harrow under oath and are true?

The Court: Well, he will stipulate that they are made under oath, and I suppose it is not necessary, because they are right there.

Mr. Stone: It shows on the face of it that it is made under oath.

The Court: I am not going to ask him. If you want to persist in your objection, I am inclined to agree with you that up to now I don't see any materiality, and I will sustain it. [87]

Mr. Melville: Will opposing counsel stipulate with me that if Mr. Harrow were here he would testify to the facts alleged in his complaint?

Mr. Stone: I believe he would, but I told you that I didn't know anything about it and I was not present.

Mr. Melville: If you will so stipulate, I will withdraw my objection.

(Testimony of Helen B. Kendall.)

Mr. Stone: I will so stipulate that I believe he would, I believe he did in that case, but I don't know enough about the facts.

The Court: I would take it, it either can be taken as a fact or it cannot, and I cannot do that unless it is a stipulation of evidence.

Mr. Stone: I think the complaint speaks for itself. It is a verified complaint filed in the case and the divorce was granted in the matter.

Mr. Melville: Your Honor, what my difficulty here is——

The Court: I don't see how I can do any more than sustain your objection, which I am going to do.

Mr. Melville: I appreciate that, but your Honor, if you will let it go in without the stipulation——

The Court: He has quit, so I will have to sustain the objection.

Mr. Stone: If the Court please, the record [88] stipulation in Paragraph 3 refers to the fact of the marriage and the divorce, and this is a part of the same transaction, that the divorce was made and the money was paid the same day it was paid in the trust, part of the same transaction.

The Court: I don't see any materiality in that to the question as to whether this was a trust in contemplation of death. The facts that have been testified to here as to the relationship between the two could have been just as well so if there never had been any divorce, and certainly they could be just as well so if the divorce had been one in which

(Testimony of Helen B. Kendall.)

Mrs. Harrow had been the plaintiff, and so I don't see the materiality of that paper and I am going to sustain the objection.

Mr. Stone: If the Court please, it looks to me as though we have the evidence as to what Mrs. Higgins had in mind when she made the trust, because——

The Court: Now, if there is something in there that is relevant because Mr. Harrow says it——

Mr. Stone: That is it.

The Court: Then there is only one way to get that evidence, and that is to bring him here as a witness.

Mr. Melville: Or stipulate with me if he were here he would so testify. In that event I will withdraw my objection. [89]

The Court: Mr. Stone has already explained he won't do that.

Mr. Stone: I will then offer in evidence—I would like, if I can have that complaint then marked for identification.

The Court: Surely.

(The document heretofore received in evidence as Petitioner's Exhibit No. 16 was rejected and marked for identification Petitioner's Exhibit No. 16.)

Mr. Stone: Is it necessary to take exception to the ruling of the Court or are those granted?

The Court: I am going to leave that to you.

Mr. Stone: I would just like to have an excep-

(Testimony of Helen B. Kendall.)

tion noted. Then may I have marked for identification the commission to take depositions in the case of Harrow versus Harrow of the Witness Mary Mountain.

The Court: Are you offering that or just having it marked?

Mr. Stone: I am just having it marked. I am going to offer it. At this time I offer in evidence this commission to take deposition of the Witness Mary Mountain in the case of Samuel Harrow versus Dell Hinds Harrow, for the purpose of showing the relationship between the parties just prior to the making of the trust. [90]

Mr. Melville: Are you offering the whole deposition or just the commission to take it?

Mr. Stone: Just the certified copy showing the commission to take it.

Mr. Melville: I object to that, your Honor; the materiality has not been shown, and I believe can't be shown.

The Court: There again you are introducing this thing to show that there was such a deposition, or for proof of the facts contained in it? Isn't that inadmissible here as heresay?

Mr. Stone: Unless it is admissible as part of the same transactions that were involved. We claim that the divorce and the trust were all part of the same transaction, and this is just part of the reason for the divorce, which was also the reason for her making the trust.

(Testimony of Helen B. Kendall.)

The Court: But that still would not get around the best evidence rule.

Mr. Stone: Again, if it is a part of the transaction, referring to the stipulation, Paragraph 3, the stipulation does say that the following facts may be accepted as true, giving either party the right to introduce other evidence not inconsistent therewith.

The Court: Of course, we have had stipulated all those papers which would be in the record.

Mr. Stone: I offered that but counsel would not [91] stipulate.

The Court: Well, I will sustain the objection.

Mr. Stone: And we take an exception to the ruling, please.

(The document above-referred to was marked  
Petitioner's Exhibit No. 17 for identification.)

Mr. Stone: May an exception be noted to the ruling of the Court on the testimony this morning of Mr. Higgins, where I made objections to the questions of counsel and they were overruled?

The Court: All right.

Mr. Stone: I would like to have the interlocutory judgment by default in the case of Harrow versus Harrow marked for identification.

(The document above-referred to was marked  
Petitioner's Exhibit No. 18 for identification.)

Mr. Stone: I offer this interlocutory judgment by default in the case of Harrow versus Harrow, in this case, for the purpose of completing the

(Testimony of Helen B. Kendall.)

evidence offered by the last two exhibits, 16 and 17.

Mr. Melville: I object, your Honor. That doesn't go to prove or disprove any fact that is material to this litigation.

The Court: Now, that is a different thing. As I understand it, you don't object to that on the ground it is [92] not authentic; in other words, that it is not an exemplified copy?

Mr. Melville: We have stipulated here that Mr. Harrow sued and obtained a divorce from Mrs. Harrow, the decedent in this case. We have already stipulated that.

The Court: This is the divorce?

Mr. Melville: A copy of it.

The Court: I will overrule the objection. It will be received and marked.

(The document heretofore marked Petitioner's Exhibit No. 18 was received in evidence.)

Mr. Stone: I then offer the final judgment of divorce in the case of Harrow versus Harrow.

Mr. Melville: No objection. We have already stipulated to that.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 19.)

Mr. Stone: I would like to offer in evidence the petition of Dell Hinds Harrow to change her name to Dell Hinds Higgins.

(Testimony of Helen B. Kendall.)

Mr. Melville: Your Honor—

Mr. Stone: A certified copy of the court record.

Mr. Melville: We are cluttering up the record with that, your Honor. We have already stipulated in the stipulation which has heretofore been filed that she did petition to change her name and did change it.

The Court: Do you object to it?

Mr. Melville: No, your Honor.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 20.)

Mr. Stone: I offer in evidence the order of the Superior Court changing the name of Dell Hinds Harrow to Dell Hinds Higgins, dated August 30, 1929.

Mr. Melville: No objection.

The Court: It will be received and marked in evidence. Is there any reason why these documents should not have been stipulated?

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 21.)

Mr. Stone: I don't know why. We tried to get them stipulated and counsel was very nice about the things that were stipulated, but this one that I have described he refused to stipulate.

(Testimony of Helen B. Kendall.)

Mr. Melville: Your Honor—

The Court: Let's not go into that, except I want counsel to recall in the future the Court's rules require everything to be stipulated that can be. As I understand, you are not objecting to this?

Mr. Melville: No, your Honor, but I am objecting to that statement of counsel that puts me in a position where it would appear as if I were keeping all of these documents out for the reason that I refused to stipulate. The only thing I refused to stipulate was the petition of Harrow for divorce. I objected to it today and my objection was sustained. I also refused to stipulate with respect to the deposition of Mary Mountain, because I wanted the privilege of cross-examination of Mrs. Mountain, and my objection to that was sustained. I have never seen or been asked to stipulate with respect to the rest of these documents. We did, however, stipulate and the stipulation will show that Mrs. Harrow did change her name and all the rest of these things, did obtain a divorce. That has all been stipulated. This is just cumulative.

Mr. Stone: Here is counsel's file that we had along when we came to stipulate, and it contains all of these papers yet to be offered, and he refused to stipulate to it.

The Court: I am not going to go into it any further at this time, because the sole purpose of that is to save time and we are losing the time now.

Mr. Melville: Yes.

(Testimony of Helen B. Kendall.)

The Court: As I understand, you do not object to this last offer?

Mr. Melville: No, your Honor.

The Court: It will be received and marked in evidence.

The Clerk: The order was marked Petitioner's Exhibit 21.

Mr. Stone: You may cross-examine.

#### Cross-Examination

By Mr. Melville:

Q. How many children have you? A. One.

Q. Is that child a beneficiary of this estate?

A. After my death, yes.

Q. Did you say you did or did not have discussions with your mother, your brother and the attorney with respect to the preparation of this trust agreement?

A. After my brother and mother discussed it, my brother either telephoned or wrote to me discussing it with me, then I went down.

Q. Did you ever discuss it in the presence of the attorney, Mr. Cobb?

A. No, I wasn't there at that time.

Q. Why did you and your brother have any discussion [96] about this trust instrument? Was any of your money going into it? A. No.

Q. Why were you part in the discussion at all, do you know?

A. Because my brother and I have to be—to agree to anything that mother agreed to in the be-

(Testimony of Helen B. Kendall.)

ginning, then we both of us have to agree, the three of us had to agree to everything.

Q. Why did you and your brother have to agree to anything that your mother was to do?

A. Because that is the way mother wished it.

Q. She wished herself to be so tied down that she could not do anything except with your and your brother's permission, is that right?

A. When it came to legal matters, she wanted our advice, but particularly my brother, who is older than I am, and mother at that time had no man to rely on, so she would always talk to my brother, and my brother would never do anything without asking me if it was right.

Q. As I understand it, then, there was no legal requirement?

A. No, no real legal thing. It was just to be courteous to our mother.

Q. I don't know what you mean by that. [97]

A. Well, don't you think that it is a nice thing to ask a person's opinion about their own affairs?

Q. But you say you were being courteous to your mother?

A. Yes, if she wanted my opinion and I could give her an honest opinion.

Q. Did you say that your mother had no physical ailment?

A. No real physical ailment, just nervousness.

Q. Did she have any mental ailment?

A. No, Heavens no. She was very——

(Testimony of Helen B. Kendall.)

Q. Was she in good health or poor health?

A. At the time that my brother spoke about, of course, her health was not good from a point of nervousness.

Q. Would you say her health was very poor?

A. Can you designate health that way?

Q. I don't know, but you did in the affidavit which I am about to show you.

A. There is probably legal distinctions between nervousness——

Q. Is that your signature?

A. Yes. This said that my mother was being made very nervous, highly nervous.

Mr. Melville: I offer this.

The Witness: I don't know what you would call that, ill health or nervousness, or what you would call it.

Mr. Melville: I offer in evidence as the respondent's exhibit next in order the affidavit of Helen B. Kendall. Is there any objection?

Mr. Stone: No.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Respondent's Exhibit P.)

Q. (By Mr. Melville): I call your attention to the language right through here, Mrs. Kendall: "Affiant's mother, who was then aged, and in very poor health——" What do you mean by that?

(Testimony of Helen B. Kendall.)

A. She was getting older and her health was not good when she was getting older, which was very reasonable.

Q. And her health was very poor?

A. In very recent years; I mean, right within three or four years.

Q. Mrs. Kendall, do you recall the occasion for executing this affidavit?

A. No, I don't remember just the date of it.

Q. Well, the date, Mrs. Kendall, is April 30, 1946, as shown at the bottom, you appeared before Mr. Stone and swore to that.

A. This is the same time that my brother—

Q. Did you execute this affidavit in connection with the estate tax matter then pending before the Treasury Department?

A. No, I don't think I was aware of it then, definitely.

Q. All right, I will read the last paragraph: "This affidavit is a true statement of facts I will testify to if called as a witness in the matter of the determination of the Federal estate tax on the March 24, 1928, trust of Dell Hinds Higgins." Does that refresh your memory?

A. That was not done in the terms that you insinuate.

Q. Well, I will ask my question. Do you now recall why you executed this affidavit?

A. I guess, I think so.

Q. You also recall why you executed it—Isn't it a fact that you executed this affidavit to be

(Testimony of Helen B. Kendall.)

submitted to the Treasury Department to influence the estate tax result in your mother's estate?

A. It was not to influence anyone. It was not for that purpose.

Q. Did you read the affidavit before you executed it?

A. Yes, but I have made so many affidavits and signed so many papers in regard to all this that I sometimes lose track of those things.

Q. Was that affidavit, at the time that you executed it, read to you? [100] A. Yes.

Q. And were the statements contained therein true? A. Yes.

Q. And they are still true? A. Yes.

Q. "Helen B. Kendall, being first duly sworn, deposes and says that she is the daughter of Dell Hinds Higgins and sister of Sydney M. Higgins, who has made affidavit as to the facts in connection with the trust made by my said mother, March 24, 1928; that the statements of said Sydney M. Higgins in his affidavit as to the reason for making the irrevocable trust and the non-taxability thereof, are all true of her own knowledge." Do you affirm that now while you are on the witness stand?

A. Well, I think that that is what they said that was correct.

Q. The part that I read to you from your affidavit, is that true?

A. Yes, if I signed it.

Q. Well, you did sign it?

A. Yes, I did.

(Testimony of Helen B. Kendall.)

Q. Then it is true?

A. Well, it must be, if I signed it.

Q. I believe you testified that when you found this bank book of your mother's, you also found a will or wills; [101] was it one or more wills?

A. I didn't find any wills.

Q. I must have misunderstood you, but I understood when you were going through the trunk you found a will.

A. No, I didn't find any will.

Q. The \$5,000.00 that was paid to Mr. Harrow, were you in on the discussions that preceded the payment of that \$5,000.00?

A. No, because I was in Altadena.

Q. Do you know whether an agreement was obtained from him in writing with respect to that?

A. It wasn't.

Q. It was not?           A. No.

Q. Was there an agreement obtained orally from him with respect to that \$5,000.00?

A. I didn't hear the first part.

Q. Was there any agreement, oral or otherwise, obtained from Mr. Harrow with respect to that \$5,000.00 payment?           A. Not that I know of.

Q. Are you under the impression that the \$5,000.00 was paid to him without any agreement whatsoever?

A. Well, I know that it was discussed with him by, I imagine, Mr. Cobb, but I wouldn't be there, and I don't [102] know whether my brother was or not, but it was paid to him, I do know that.

(Testimony of Helen B. Kendall.)

Q. But you don't know whether an agreement was obtained or what the provisions of it were?

A. No, I don't think there was any. He just was given a check.

Q. I call your attention to this bank book which is in evidence as Petitioner's Exhibit 15 and to the fact that on April 2nd, 1928, \$5,000.00 was withdrawn. That is the \$5,000.00 that went to Mr. Harrow?

A. That is right, yes.

Q. On that same day, April 2nd, 1928, \$15,000.00 was withdrawn. Do you know what was done with that?

A. I think that was put in the trust.

Q. That is the money that went into the trust?

A. Yes.

Q. And that shows that together with some interest that was applied, the following day, April 3, 1928, there was a balance left in the account—the interest, incidentally, was \$101.58—and that left a balance in the account of \$418.51, and that was drawn out on April 3. Do you know what happened to that?

A. No, I don't.

Q. The account was closed out, though, on that date, wasn't it? [103]

A. I don't know, but it looks like it.

Q. Now, did your mother have any discussion with you with respect to the closing out of her bank account?

A. Well, I don't remember whether she did or not. That was a long time ago.

(Testimony of Helen B. Kendall.)

Q. Did she say anything to you about having to put her house in order?

A. Just exactly what do you mean?

Q. I mean, did she discuss with you the fact that she was now free of all worries, that she had put her money in trust and had completely disposed of her finances and her property?

A. She was very happy that it was done in a certain sense, and in another way mother hated to give up the running of her own property, but she knew it was the best thing to do to protect herself.

Q. Isn't it a fact that Mr. Harrow was separated from your mother on and after the 15th of March, and that thereafter he never saw her again?

A. I just can't answer that. I don't know.

Mr. Melville: No more questions.

The Court: Any redirect examination?

Mr. Stone: I would like to, if the Court please, renew the offer of the Exhibits 16 and 17.

The Court: Just a minute, please, Mr. Stone. Have [104] you any more questions?

Mr. Stone: I have none.

The Court: Well, I have one or two questions. I am sorry. I thought you were getting ready for redirect.

You said, I believe, that your mother was in a very nervous condition about the time that this agreement was executed?

The Witness: Yes.

The Court: How did that nervousness manifest itself?

(Testimony of Helen B. Kendall.)

The Witness: That is hard to say.

The Court: Speak up, please, so these gentlemen can hear, too.

The Witness: She just wanted us to keep her and she said she was just frantic, she needed somebody to help her out of this situation, she didn't know which way to turn, and of course, she was in tears a great deal of the time.

The Court: Excuse me. One manifestation was that she was crying a good deal of the time?

The Witness: Yes, she was.

The Court: What else do you know?

The Witness: Well, that is just about all, just nervous, you know how people are when they are nervous, they go to pieces and they cry.

The Court: They cry, and you remember some other things. Do you know anything about her other physical symptoms?

The Witness: No.

The Court: Do you know, for instance, whether she was able to eat anything?

The Witness: Of course, this upset her digestion.

The Court: It did upset her digestion?

The Witness: Yes, it did.

The Court: Were there any other things, physical things, that happened to her?

The Witness: No, I would say just nervous conditions like that.

The Court: You say nervous conditions. Her digestion, that is a physical thing.

(Testimony of Helen B. Kendall.)

The Witness: Yes, it is; that is physical.

The Court: Now, were there any other physical things?

The Witness: There wasn't anything else that I can think of, just those conditions were very aggravated.

The Court: They were aggravated?

The Witness: Yes, sure.

The Court: Was she under the care of a physician during this time?

The Witness: She was there, yes, after this episode of the keys. [106]

The Court: After the episode of the keys?

The Witness: Yes.

The Court: For how long after that?

The Witness: Well, it was just a day or two; well, maybe a month or two, something like that, and then she left the sanitarium, she was very much better after she was free of everything.

The Court: But there for about a month after the episode of the keys she was under the constant care of a physician, is that right?

The Witness: Yes, she was there about a month.

The Court: I say, during that month was she under the care of a physician?

The Witness: Yes, you always are, you know, anyway, when you are in a rest home. They always have resident physicians there.

The Court: This was in addition to that, is that right?

The Witness: Yes.

(Testimony of Helen B. Kendall.)

The Court: I have no further questions.

The Witness: On account of being—because she had a cut, of course, the physician had to attend to the cut on her face.

The Court: Well, he didn't have to attend to the cut on her face for a month, did he? [107]

The Witness: Oh, no. No, she was just recovering from her nervousness during this month, month or two, I am not certain whether it was a month or two.

The Court: I have no further questions.

The Witness: Pardon me?

The Court: I say, I have no further questions.

Mr. Stone: No further questions.

The Court: All right.

(Witness excused.)

Mr. Stone: I would like to renew the offer of the two exhibits marked for identification No. 16, being the complaint in divorce in the case of Harrow versus Harrow, and No. 17, the commission to take testimony, because of the additional reason that the divorce decrees have been entered, that is, as furnishing the basis on which the decree was entered, and also furnishing the date on which the separation was made that counsel has inquired about, and it seems to me the others here, since the decrees have been offered in evidence and received, should be admissible.

The Court: You are offering them to prove the facts stated therein, is that right? If you are offering them to prove that there was a petition, I

would accept it for that limited purpose, but it would not help you any, because it would not show that those facts are true.

Mr. Stone: I am offering them to get the facts before the Court.

The Court: You want to get the facts before the record, and there is only one way to do it, and that is to produce these people as witnesses. That is elementary, isn't it, Mr. Stone? This is just as much hearsay as if it was a letter.

Mr. Stone: Unless it is part of the same transaction, which I think it is. I think this divorce and the trust are all part of the same transaction, which makes it admissible.

The Court: I don't think you will find that would make it admissible under the rules of evidence of the Equity Courts of the District of Columbia, which is what we are guided by. Same ruling. The objection is sustained.

Mr. Stone: May my exception be noted, please? The petitioner rests.

The Court: Anything for respondent?

Mr. Melville: Yes, your Honor. Pursuant to the stipulation of the parties, I at this time offer the original of the Federal estate tax return as our joint Exhibit 1-A.

The Clerk: You have joint exhibits up to 14-N attached to the stipulation.

Mr. Melville: No, the stipulation provided that we might offer those now and I am now offering it. [109]

The Court: As 1-A?

Mr. Melville: Yes, your Honor.

The Court: I take it there is no objection?

Mr. Stone: No objection.

The Court: It will be received and marked in evidence 1-A.

(The document above-referred to was received in evidence and marked Joint Exhibit No. 1-A.)

Mr. Melville: Your Honor, for the purpose of establishing what I tried to establish by cross-examination without being able to do so satisfactorily, that Mr. Harrow and the decedent in this case were separated on or about March 15, 1928, and for that purpose only, I offer the certified copy of the complaint in divorce.

Mr. Stone: Well, I object to it going in for that purpose.

The Court: Sustained. If you gentlemen can stipulate to that, you may get it in the record that way.

Mr. Melville: Will you stipulate to that fact?

Mr. Stone: I don't know it to be a fact except as I see it in the record. No, I can't.

The Court: It is contained in a document that you objected to going in, and I want to say that Mr. Stone has the burden of proof in this case anyway. However, if you can't stipulate it and you object to it, the objection [110] is sustained. Anything further?

Mr. Melville: Respondent rests.

\* \* \*

Filed Oct. 17, 1947, T.C.U.S. [111]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT  
AND OPINION

Opper, Judge:

This proceeding was brought for a redetermination of a deficiency in estate tax of \$29,009.69. The deficiency results from the inclusion in decedent's gross estate of the value of a trust created by decedent on March 24, 1928.

The questions presented are whether the transfer of March 24, 1928, was in contemplation of death; whether the transfer was intended to take effect in possession or enjoyment at or after death, within the meaning of Internal Revenue Code, section 811(c); and whether decedent reserved the power to alter, amend, revoke or terminate the trust, within the meaning of Internal Revenue Code, section 811(d).

The facts were presented by a stipulation of the parties, and evidence adduced at the hearing. Those facts hereinafter appearing which are not from the stipulation are otherwise found from the record.

Findings of Fact

Dell Hinds Higgins, the decedent, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. Petitioner filed a Federal estate tax return with the collector for the sixth internal revenue collection district of California on May 15, 1945. The return so filed did not disclose a net estate.

Decedent and her two sisters had been the beneficiaries of the estate of their parents which included a building in Seattle, Washington. The estate formed a corporation called Hinds Estate, Incorporated, to operate the building, and decedent became vice-president of that corporation at a salary of \$70 per month.

In 1887 decedent married Albert Edward Higgins. They had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913. Both of their children are still living. Sydney has three children, and Helen has one child.

Albert Higgins left no will at the time of his death. Both Sydney and Helen were of age at that time and never claimed any share of the estate which went in its entirety to decedent.

In about 1903 decedent almost died of pneumonia. In 1918 she fell and injured her hip, and for the remainder of her life she was not able to walk well.

In 1919 decedent met Samuel Harrow, who was employed by a jewelry firm in San Diego. Harrow was not married, and was eight or nine years older than decedent. After knowing Harrow for six years decedent married him on April 9, 1925. Decedent wanted companionship and did not want Harrow to work. After they were married he resigned his position with the jewelry firm and became financially dependent upon decedent. Thereafter, con-

troversies arose relating to money matters. Harrow plagued and harassed decedent for money and caused her to become highly nervous. She became afraid of Harrow, who would take her past cemeteries and hospitals and tell her that that was where he was going to put her. He constantly made demands upon her for money and kept her in an agitated mental condition. She had a constant fear that Harrow was going to cause her death in order to get her money.

A few months before March 24, 1928, when decedent created the trust here in question, she went to Paradise Valley Sanitarium at National City, near San Diego, California. She desired to get away from Harrow.

On the evening of March 19, 1928, decedent's doctor called Sydney and requested him to come to the sanitarium immediately because Harrow had been coming there frequently and disturbing decedent by making demands upon her for advances of money, and that on that morning decedent had walked downstairs from her room and was sitting out in the front garden when Harrow came; that while he was conversing with her he suddenly stepped off a few feet and threw a bunch of keys at decedent, hitting her in the face. The keys cut her. Sydney went to his mother at once. She was in a very nervous conditions and seriously ill. When she was in such a state she cried frequently and her digestion was upset. She was under the care of a physician while she was at the sanitarium.

She left the sanitarium within a month or two, having improved rapidly after she created the trust, as hereinafter related.

After Sydney and decedent talked the matter over, Sydney went into San Diego and met an attorney whom he knew. He consulted with the attorney on the problem and the attorney suggested the creation of a trust to meet the situation. Numerous conversations were had between decedent and her attorney. Sydney was present at the conferences. Decedent expressed her intention to divest herself of all her property and in such a manner that it would not be subject to Federal estate tax. In preparation of the trust agreement, decedent, Sydney, Helen, and the attorney discussed the making of the trust absolutely irrevocable, in order that there should be no Federal estate tax charge against it, and the attorney prepared the trust under the law then in force and advised decedent that it would not be subject to estate tax.

Sydney and Helen were interested in the property and felt that part of it belonged to them since it had been left by their father. Decedent willingly recognized this fact in making provision in the trust for the children.

The entire matter was handled expeditiously, and on March 24, 1928, decedent executed the trust instrument. During this time decedent was seriously ill, but she made no remarks of expecting death or being near death.

Decedent was a good business woman and did not

want to sign the trust since she realized that by doing so she would lose complete control of her property. However, she felt it was the only way to get free from the demands of Harrow and to prevent him from obtaining any part of her property. Decedent transferred everything she owned to the trust, except her car, jewelry, and her salary of \$70 per month as president of the Hinds Estate, Incorporated, and \$5,418.51 of her savings account with the Southern Trust and Commerce Bank of San Diego, \$15,000 being drawn from this account and placed in the trust. Of the balance, \$5,000 was withdrawn and paid to Harrow as a property settlement in connection with the divorce action which he was bringing.

The Bank of Italy National Trust and Savings Association was named trustee of the trust. Its duties and powers as trustee included the following:

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large

as possible within the limit of the restrictions hereinbefore set forth.

\* \* \*

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

With respect to the current net income, the trust indenture provided as follows:

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the trustor:

a. Seventy-five Dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five Dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

Sydney and Helen have each been receiving monthly payments as above provided.

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen.

The trust is declared to be irrevocable. However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authority to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee.

Paragraph 7 of the trust indenture provides as follows:

If it should happen during the continuance of this

trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

Decedent's marriage to Harrow was terminated by a final decree of divorce issued July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins.

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a of paragraph 3, supra, which respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the

economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the Court for invasion of corpus under paragraph 7, supra, would be required.

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the Court considered proper in the premises. On March 13, 1941, the Court entered its decree changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth.

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." On April 21, 1941, the Court entered another decree again changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a reasonably high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in: bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth.

On May 27, 1943, decedent petitioned the Court for an order authorizing and directing the trustee to pay to her the sum of \$300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of \$225 per month for the succeeding twelve months "is insufficient to adequately provide for her comfort and well-being, and that she has no

other means of support or other income." No one appeared to oppose the granting of the relief prayed for and on June 11, 1943, the Court entered its order authorizing and directing the trustee to make the payment of \$300 per month "paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be necessary to make such monthly payments until the further order of this Court."

On October 25, 1943, decedent filed with the Court a Petition for Order Allowing Additional Payment from Corpus of Trust. The petition stated in part that in previously petitioning the Court for \$300 per month, a payment of \$75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only \$225 per month; furthermore, in the past sixty days, due to the pending liquidation of Hinds Estate, Incorporated, for salary of \$70 per month as vice-president had been discontinued. In praying for an order authorizing and directing the trustee to pay her \$445 per month (\$300 plus \$75 plus \$70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows:

That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before.

On November 19, 1943, decedent filed with the Court an Amendment to Petition for Order Allow-

ing Additional Payment from Corpus of Trust in which the prayer of her petition filed on October 25, 1943, was amended to read as follows:

Wherefore, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five (\$445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate.

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the Court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943.

Pursuant to the Court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts:

1943 (subsequent to June 11)	\$ 624.06
1944	1,175.17
1945 (prior to decedent's death on March 3)	130.25
Total payments out of corpus	\$1,929.48

All of the Court proceedings detailed above were

uncontested. Except for the original petition to alter or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. Neither of the children ever requested an increase in their monthly payments of \$75 each from the trust; nor did they ever petition the Court for payments out of corpus. No corpus was ever used for the benefit of either of the two children.

Subsequent to the death of decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—Bradley-Wollman Mortuary funeral expenses	\$ 574.94
8/22/45—W. S. Heller, County Treasurer California State Inheritance Tax in matter of Estate of Dell Hinds Higgins, deceased, per order of fixing Inheritance Tax dated 8-1-45	\$3,262.44

In the Federal estate tax return the funeral expenses in the amount of \$574.94 were included in the total deductions claimed of \$2,477.38.

The property comprising the trust estate on the date of decedent's death consisted of bonds, preferred and common stock, and \$1,539.81 in cash, making an aggregate total of \$188,302.40.

At the time of her death decedent owned only her car, her jewelry, and cash in the amount of

\$1,980.27. Decedent's last will, dated April 8, 1940, reads as follows:

I give to my daughter Helen B. Kendall all my clothes, ornaments, everything in my home, except the jewelry I have already willed to others—for her to take and keep as her own. All my things in Helen's home are to be hers also.

### Opinion

As to the portion of the trust from which decedent reserved the right to the income for her life, there can now be no doubt of the includibility in the gross estate, notwithstanding that the trust was created prior to 1931. *Commissioner v. Estate of Church*, ... U. S. ... (January 17, 1949).

Inclusion of the balance is required under the principle that decedent's right to have the corpus invaded—an opportunity of which she actually availed herself on several occasions—"postponed the complete and ultimate transfer of the trust corpus until or after the decedent's death," under the principle of such cases as *Estate of Virginia H. West*, 9 T. C. 736, 739. See also *Estate of Norma P. Durant*, 41 B.T.A. 462. And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner*, ... U. S. ... (January 17, 1949).

Our conclusion that the trust is taxable as part of decedent's estate for the reasons given eliminates

the necessity of considering the alternative contention of a transfer in contemplation of death.

Decision will be entered for the respondent.

Received Feb. 7, 1949.

[Entered]: Feb. 16, 1949.

[Seal]

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The Tax Court of the United States

Washington

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, Deceased,  
SYDNEY M. HIGGINS, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered February 16, 1949, it is

Ordered and Decided: That there is a deficiency in estate tax of \$29,009.69.

[Seal] /s/ CLARENCE OPPER,  
Judge.

[Entered]: Feb. 17, 1949.

[Served]: Feb. 17, 1949.

In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, DE-  
CEASED, SYDNEY M. HIGGINS, EXECU-  
TOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION TO REVIEW DECISION OF THE  
TAX COURT OF THE UNITED STATES  
AND ASSIGNMENT OF ERRORS

To: the Honorable, the Judges of the United  
States Court of Appeals for the Ninth Circuit:

Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, petitioner in this cause, by George H. Stone and Wm. D. Morrision, counsel, hereby files his petition for a review by the United States Court of Appeals for the Ninth Circuit of the Memorandum Findings of Fact and Opinion, and Decision, by The Tax Court of the United States entered February 16, 1949, and February 17, 1949, respectively, Docket No. 10891, determining a deficiency in petitioner's United States Estate Tax in the sum of \$29,009.69 and respectfully shows:

## I.

## Venue

This petition for review is filed pursuant to provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

The petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, filed Form 706 United States Estate Tax Return, date of death March 3, 1945, with the Collector of Internal Revenue of the Sixth District of California, which district includes the County of San Diego, which was the residence of the decedent; that subsequent to the decision of The Tax Court of the United States, entered February 17, 1949, the petitioner, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, paid to the aforesaid Collector, on or about March 16, 1949, the sum of \$29,009.69 tax, together with interest in the sum of \$4,849.45, making a total payment to the said Collector of \$33,859.14.

## II.

## Nature of the Controversy

On May 13, 1946, the petitioner herein filed with The Tax Court of the United States, pursuant to the provisions of the Internal Revenue Code, his petition and subsequently his amended petition requesting the redetermination of the deficiency of United States Estate Tax, date of death March 3, 1945, in the sum of \$29,009.69, as shown by official

notice of deficiency mailed by the respondent to the petitioner under date of March 20, 1946.

The respondent filed his answer to the amended petition June 24, 1946, admitting the jurisdictional facts but generally denying all of the other allegations of the amended petition.

The amended petition to The Tax Court of the United States herein in substance alleges that:

(a) A trust indenture dated the 24th day of March, 1928, was made and entered into by Dell M. Harrow, who later became known as Dell Hinds Higgins, trustor (now deceased), and the Bank of Italy National Trust and Savings Association, subsequently The First National Trust and Savings Bank of San Diego, California, became trustee under the said trust indenture.

The trustor (now deceased) did by the said indenture irrevocably divest herself without reversion of the corpus of the property transferred to the trustee.

(b) The petitioner contends the decedent, who was approximately 59 years of age at the date of the trust indenture, which was March 24, 1928, was in good health, did not make the gift or transfer the property in contemplation of death, the trust was made for a reason connected with life, and she lived to the age of about 76 years, which was approximately 17 years after the trust indenture was entered into.

(c) The petitioner contends that no part of the corpus of the trust created by decedent March 24, 1928, as valued at date of death, in the sum of

\$188,302.40, should be included as a part of either the gross or net Estate of Dell Hinds Higgins, Deceased.

(d) The petitioner contends that the transfer of the property as set out in the said trust indenture of March 24, 1928, which by its terms was irrevocable, fully, completely, and without reversion, divested the trustor of the property transferred during her lifetime, was not made in contemplation of death and was not intended to take effect in possession or enjoyment at decedent's death but was effective at the date of the trust indenture, namely, March 24, 1928, and that the value of the property in controversy in the sum of \$188,302.40, does not come within the provisions of Section 811(c) as was erroneously determined by the Commissioner.

(e) The petitioner contends that the trustor (now deceased) did not reserve unto herself the power to alter, amend, revoke, or terminate the trust, that on March 24, 1928, the trustor fully, completely, and without reversion divested herself of the property in controversy valued at date of decedent's death at \$188,302.40, and the said trust is not subject to inclusion in either the net or gross estate under the provisions of Section 811(d) as was erroneously determined by the Commissioner.

(f) The petitioner contends that the decedent transferred the property, which at the time of her death was valued by the Commissioner at \$188,302.40, fully, completely, and without reversion and at the date of the transfer which was March 24,

1928, neither Section 811(c) nor 811(d) of the Internal Revenue Code had at that time been enacted by Congress. The Commissioner erroneously construed the aforesaid sections of the Code as applicable to the value of the trust property at the date of the decedent's death and erroneously determined a deficiency of estate tax liability of \$29,009.69.

(g) The petitioner contends the inclusion of the value of the trust property in either the net or gross value and the determination of a deficiency of estate tax, or the assessment of a tax thereon, is erroneous on the part of the Commissioner and is contrary to the Fifth and the Fourteenth Amendment to the Constitution of the United States of America.

The Commissioner of Internal Revenue determined the Estate Tax deficiency, \$29,009.69, by including in the gross estate the corpus of a certain trust created by decedent, March 24, 1928, and valued at the date of death, March 3, 1945, in the amount of \$188,302.40 on (any one of) the following grounds:

(1) It represented an inter vivos transfer made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code.

(2) It represented an inter vivos transfer intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

(3) The decedent reserved the power to alter, amend, revoke, or terminate the trust within the

meaning of Section 811(d) of the Internal Revenue Code.

On September 22, 1947, the cause was heard before Honorable Clarence V. Opper, Judge, Division 14, of The Tax Court of the United States, sitting at Los Angeles, California. Petitioner and respondent each filed an opening brief and each filed a reply brief and the cause was submitted for decision. The Tax Court of the United States entered its Memorandum Findings of Fact and Opinion February 16, 1949, and the final Order and the final Order and Decision was entered February 17, 1949, finding a deficiency of \$29,009.69.

### III.

#### Designation of the Court of Review

The said petitioner being aggrieved by the Memorandum Findings of Fact and Opinion, and Order and Decision of The Tax Court of the United States desires a review thereof, pursuant to the provisions of the Internal Revenue Code, by the United States Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue of the Sixth District of California to whom the said petitioner made his United States Estate Tax Return, date of death, March 3, 1945.

### IV.

#### Assignment of Errors

Now Comes the petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, and assigns as errors in the Memorandum

Findings of Fact and Opinion, and Order and Decision, the following acts and omissions of The Tax Court of the United States:

(1) The Findings of Fact of The Tax Court are not supported by the evidence;

(2) The failure to hold the transfer of the corpus of the trust of March 24, 1928, was an inter vivos transfer, and not made in contemplation of death;

(3) The failure to hold that the transfer was inter vivos and was intended to take effect in possession or enjoyment at the time it was made, namely, March 24, 1928, within the meaning of Internal Revenue Code, Section 811(c);

(4) The failure to hold that the decedent did not reserve the power to limit, amend, transfer, or revoke the trust within the meaning of the Internal Revenue Code, Section 811(d);

(5) The failure to determine that the transfer of the gift was made prior to March 3, 1931, and the value of the property of the trust was for that reason not subject to estate tax;

(6) The failure to hold that said gift was made for a purpose connected with life: namely, to divest herself of the property so that her then husband could not get it and for that reason not subject to estate tax;

(7) The failure to find that the gift could not have been made in contemplation of death as the trustor was in normal health at the time the trust was created, March 24, 1928, and lived seventeen years thereafter;

(8) The failure to find that the property of the

trust was not subject to estate tax pursuant to Section 811(c) and/or Section 811(d) of the Internal Revenue Code as both sections became effective subsequent to the effective date of the trust, March 24, 1928, were not retroactive and for that reason the Decision was contrary to the Fifth and to the Fourteenth Amendment to the Constitution of the United States of America;

(9) The failure to find the Trustor did not retain a string on the corpus of the trust property;

(10) The failure to hold that there was no possibility of the trust property reverting to the trustor;

(11) The failure to determine the trustor only reserved a part of the income of the trust property to herself as a definite amount of the income was at the time the trust was created given to her daughter Helen and her son Sydney;

(12) The failure to find the trust indenture was irrevocable and the trust property passed completely out of the control of the trustor;

(13) The failure to hold the trustor's estate possessed no right or interest in the trust property at the time of the trustor's death as the transfer of the trust property passed on March 24, 1928, at the time the trust was created.

Wherefore petitioner prays that said errors be corrected and that the judgment and findings of The Tax Court of the United States be reversed and that judgment be entered for the petitioner for the estate tax and the interest thereon which has been

paid to the said Collector in the total sum of \$33,859.14, together with interest thereon from and after the date of payment thereof.

ESTATE OF DELL HINDS  
HIGGINS,  
Deceased.

By /s/ SYDNEY M. HIGGINS,  
Executor.

/s/ GEORGE H. STONE,  
Counsel for Petitioner.

/s/ WM. D. MORRISON,  
Counsel for Petitioner.

State of California,  
County of Marin—ss.

Sydney M. Higgins, being first duly sworn, deposes and says: That he is Executor of the Estate of Dell Hinds Higgins, Deceased; that as such Executor he is the petitioner above named; that he has read the foregoing Petition and knows the contents thereof and that the same is true of his own knowledge and belief, except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

/s/ SYDNEY M. HIGGINS.

Subscribed and sworn to before me this sixth day of May, 1949.

[Seal] /s/ ARNOLD WARE JONES,  
Notary Public in and for the County of Marin,  
State of California.

My Commission Expires December 17, 1950.

Received May 11, 1949, T.C.U.S.

Filed and Docketed May 11, 1949, T.C.U.S.

[Title of Court of Appeals and Cause.]

**NOTICE OF FILING PETITION TO REVIEW  
DECISION OF THE TAX COURT OF THE  
UNITED STATES AND ASSIGNMENT OF  
ERRORS**

To: Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., Charles Oliphant, Attorney for Respondent, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You Are Hereby Notified that the petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, on the 11th day of May, 1949, filed with the Clerk of The Tax Court of the United States, Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above entitled cause.

A copy of the petition for review and the assignment of errors is hereby filed and served upon you.

Dated at San Diego, California, this 11th day of May, 1949.

Respectfully,

/s/ GEORGE H. STONE,

Counsel for Petitioner.

/s/ WM. D. MORRISON,

Counsel for Petitioner.

Personal service of the foregoing notice, together

with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 11th day of May, 1949.

/s/ CHARLES OLIPHANT,  
 Attorney for Respondent,  
 Chief Counsel,  
 Bureau of Internal  
 Revenue.

Filed May 12, 1949, T. C. U. S.

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The Tax Court of the United States  
 T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, DE-  
 CEASED, SYDNEY M. HIGGINS, EXECU-  
 TOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
 Respondent.

DESIGNATION OF CONTENTS OF  
 RECORD ON REVIEW

To the Clerk of The Tax Court of the United  
 States:

You will please transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, duly certified as being the originals, or a transcript of your record, or copies of orders,

the following documents and records without diminution in the above entitled cause in connection with the Petition to Review by the said Court of Appeals for the Ninth Circuit heretofore filed by Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, the above named petitioner:

1. The docket entries of all proceedings before The Tax Court of the United States.
2. Petition.
3. Amended Petition.
4. Answer to Amended Petition.
5. Stipulation of Facts, filed September 22, 1947.
6. Official Report of Proceedings before The Tax Court of the United States, September 22, 1947.
7. Petitioner's Exhibits Nos. 15, 18, 19, 20, and 21.
8. Respondent's Exhibits O and P.
9. Joint Exhibits of Petitioner and Respondent—1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L, 13-M, and 14-N.
10. Memorandum Findings of Fact and Opinion of The Tax Court entered February 16, 1949.
11. Decision of The Tax Court entered February 17, 1949.
12. Petition to Review Decision of The Tax Court of the United States and Assignment of Errors, filed on May 11, 1949.
13. Notice of Filing Petition to Review Decision of The Tax Court of the United States and Assignment of Errors, filed on May 12, 1949.

14. This Designation of Contents of Record on Review together with Acknowledgment of Service thereof.

Said record to be prepared as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE H. STONE,  
Counsel for Petitioner.

/s/ WM. D. MORRISON,  
Counsel for Petitioner.

Acknowledgment of Service

Personal service of a copy of this Designation of Contents of Record on Review is hereby acknowledged as having been made this 6th day of June, 1949.

/s/ CHARLES OLIPHANT,  
Chief Counsel,  
Bureau of Internal Revenue,  
Counsel for Respondent.

Filed and Docketed June 6, 1949, T. C. U. S.

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[Endorsed]: No. 12279. United States Court of Appeals for the Ninth Circuit. Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed June 27, 1949.

/s/ PAUL P. O'BRIEN, ,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS,  
DECEASED, SYDNEY M. HIGGINS,  
EXECUTOR,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

STATEMENT OF POINTS ON WHICH PETI-  
TIONER INTENDS TO RELY AND DES-  
IGNATION OF PARTS OF THE RECORD  
NECESSARY FOR CONSIDERATION

To the Honorable Paul P. O'Brien, Clerk of the  
United States Court of Appeals for the Ninth  
Circuit:

Petitioner adopts as his points on appeal the  
assignment of errors included in the petition to  
review within the transcript of record.

Petitioner designates for printing the following:

1. The docket entries of all proceedings before  
The Tax Court of the United States.
2. Amended Petition.
3. Answer to Amended Petition.
4. Stipulation of Facts filed September 22, 1947.

5. Official Report of Proceedings before The Tax Court of the United States which appears on Pages 17 to the second line of 111, inclusive.
6. Memorandum Findings of Fact and Opinion of The Tax Court entered February 16, 1949.
7. Decision of The Tax Court entered on February 17, 1949.
8. Petition to Review Decision of The Tax Court of the United States and Assignment of Errors filed on May 11, 1949.
9. Notice of Filing Petition to Review Decision of The Tax Court of the United States and Assignment of Errors filed on May 12, 1949.
10. Designation of Contents of Record on Review and the Acknowledgment of Service thereof.
11. This Statement of Points on which Petitioner intends to rely and Designation of Parts of the Record necessary for consideration.

Said transcript to be prepared as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

That no exhibits indentified as Petitioner's Exhibits Nos. 15, 18, 19, 20, and 21, Respondent's Exhibits O and P, and Joint Exhibits of Petitioner and Respondent Nos. 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L, 13-M, and 14-N, be printed in the record on review herein but any or all of said Exhibits may be referred to by counsel in their respective briefs and on oral argument,

or reproduced, in whole or in part, in an appendix to their respective briefs, and considered by the Court with the same force and effect as if included in the printed record on review; that the petitioner on review does not exclude or omit any part of the record in this proceeding.

Dated: June 10, 1949.

/s/ GEORGE H. STONE,  
Counsel for Petitioner on  
Review.

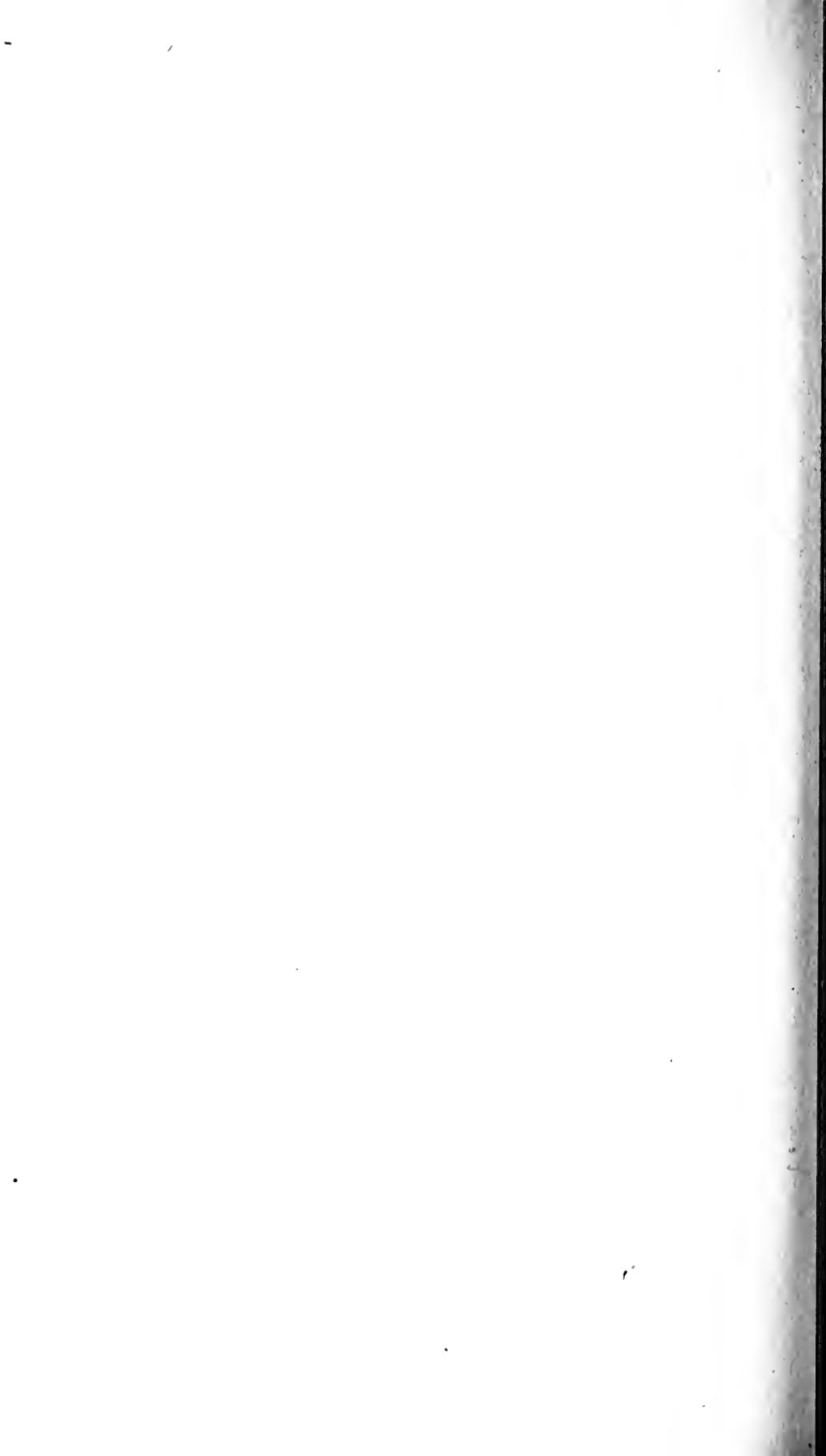
/s/ WM. D. MORRISON,  
Counsel for Petitioner on  
Review.

Statement of Service

Two conformed copies of this Statement of Points were mailed to Charles Oliphant, Chief Counsel for Respondent on Review, on June 10, 1949.

/s/ GEORGE H. STONE,  
Counsel for Petitioner.

/s/ WM. D. MORRISON,  
Counsel for Petitioner.



In the  
United States  
Court of Appeals  
For the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS,  
Deceased,  
SYDNEY M. HIGGINS, Executor,  
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL  
REVENUE,  
*Respondent.*

ON PETITION FOR REVIEW OF THE DE-  
CISION OF THE TAX COURT OF THE  
UNITED STATES.

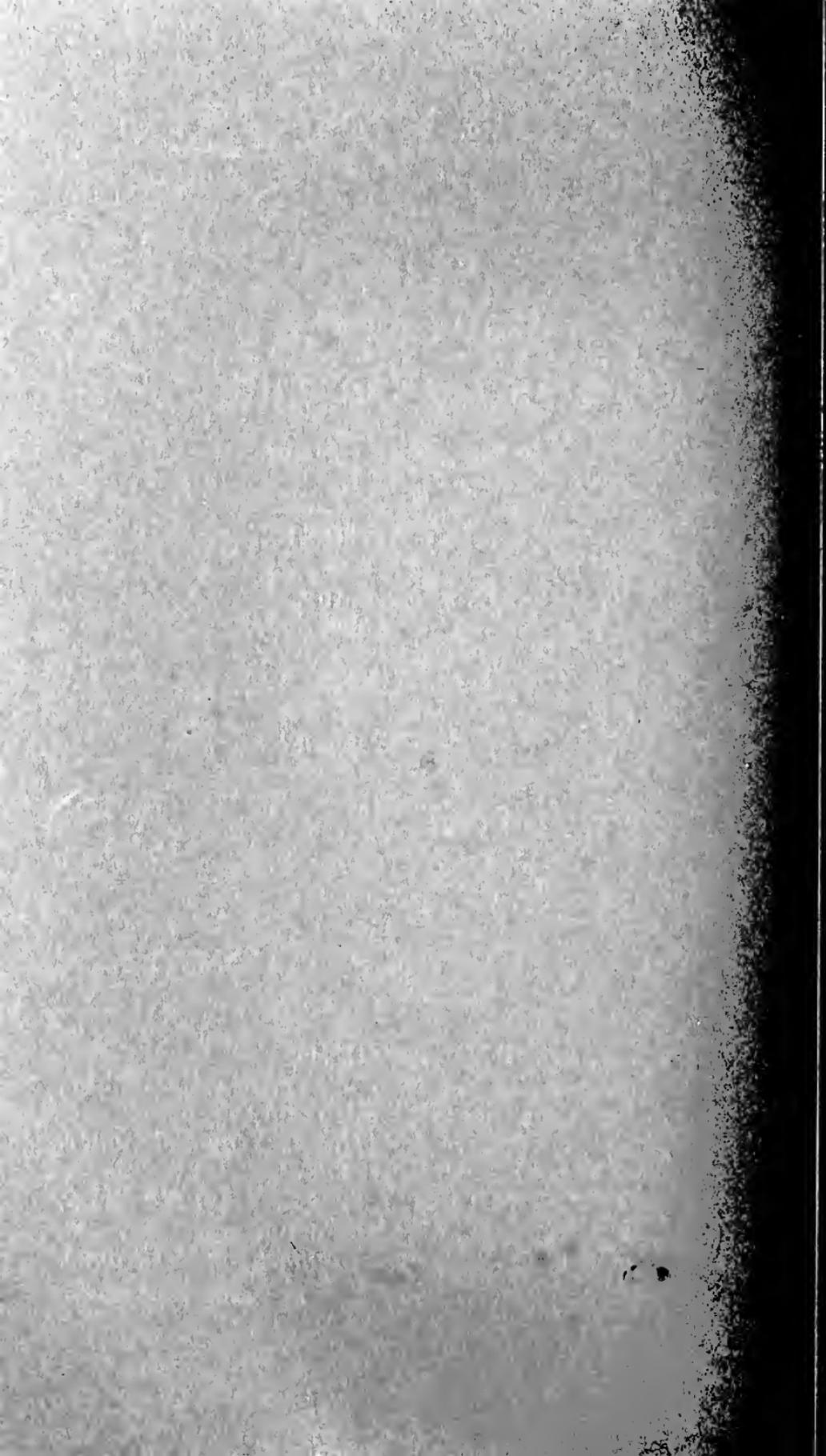
BRIEF FOR THE PETITIONER

GEORGE H. STONE,  
1004 San Diego Trust & Savings Bldg.,  
San Diego 1, California,  
*Counsel for Petitioner.*

WM. D. MORRISON,  
840 San Diego Trust & Savings Bldg.,  
San Diego 1, California,  
*Counsel for Petitioner.*

FILED  
SEP 19 1948

PAUL P. O'BRIEN,



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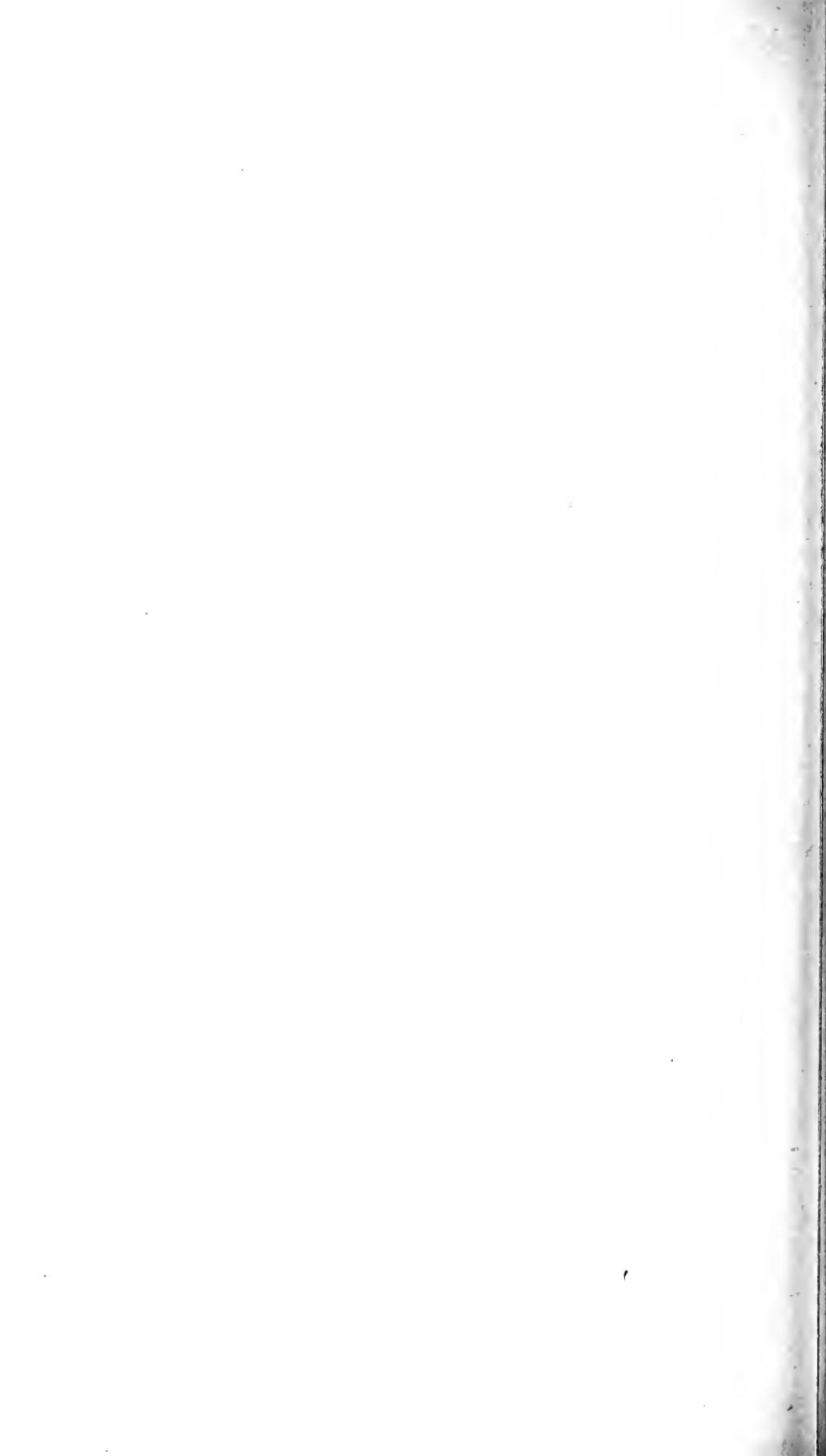
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In the  
United States  
Court of Appeals  
For the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS,  
Deceased,  
SYDNEY M. HIGGINS, Executor,  
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL  
REVENUE,  
*Respondent.*

No. 12279

ON PETITION FOR REVIEW OF THE DE-  
CISION OF THE TAX COURT OF THE  
UNITED STATES.

---

BRIEF FOR THE PETITIONER

---

OPINION OF THE TAX COURT

The Memorandum Findings of Fact and Opinion of The Tax Court of the United States (R. 113-127) are not officially reported.

## JURISDICTION

The petition for review (R. 128-138) involves Federal Estate Tax, date of death March 3, 1945. On March 20, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$29,009.69 (R. 4, 9-12). Within 90 days thereafter and on May 13, 1946, the taxpayer filed his petition and subsequently his amended petition, June 3, 1946, with The Tax Court of the United States for a redetermination of the deficiency, pursuant to provisions of section 272 of the Internal Revenue Code (R. 3-21). The decision of The Tax Court sustaining the deficiency was entered February 17, 1949, (R. 127). The case is brought to this Court by petition for review filed May 11, 1949, (R. 128-138), pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

## QUESTIONS PRESENTED

1. Did The Tax Court erroneously determine, as to the portion of the trust from which the decedent reserved the right to the income for life, it was includible in the gross estate notwithstanding the trust was created prior to March 3, 1931, which was the date of the Joint Resolution of Congress relating to trusts?

2. Did The Tax Court improperly determine the balance of the trust should be included as part of decedent's estate although under the provisions of the trust indenture neither the trustor nor the trustee could invade the corpus of the trust?

3. Did The Tax Court err in determining that the decedent had invaded the corpus of the trust property and by so doing postpone the transfer of the trust corpus until her death, whereas she actually parted with the property in question and all control over it on March 24, 1928, the date of the creation of the trust, with no possible chance of it reverting to her?

4. Did The Tax Court erroneously determine that it was not necessary to consider the alternative contention of a transfer in contemplation of death, that the decedent was not in bad health at the time the trust was made and lived for a period of 17 years thereafter?

## REVENUE ACT, INTERNAL REVENUE CODE, AND REGULATIONS INVOLVED

### The Law Applicable to the Trust Indenture at the Time It Was Executed, March 24, 1928

At the time the trust was executed and became effective on March 24, 1928, the law applicable to the said trust was under section 302(c) of the Revenue Act of 1926. During the period from January 1, 1926, to June 2, 1932, there was no Federal gift tax act in effect. The Joint Resolution of the Congress of March 3, 1931, the amendment to section 302(c) of the Revenue Act of 1932, and subsequent amendments thereto are prospective in their operation and for that reason do not impose a tax in respect to past irrevocable transfers with reservation of a life interest. Section 302(c) of the Revenue Act of 1926, petitioner contends, is the only act applicable to the said trust and imposes no tax thereon, which act reads as follows, to wit:

“To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money’s worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or in an interest therein, not admitted or shown to have been made in con-

templation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of \$5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;”

**Code and Regulations Not Applicable as They Became Effective, Subsequent to the Date of the Trust, March 24, 1928.**

The Tax Court relied upon sections 811(c) and 811(d) (2) of the Internal Revenue Code, although neither of the said code provisions nor the regulations with reference to said section and subsection became effective until subsequent to the effective date of the trust here in question, namely, March 24, 1928. The said sections were not retroactive and for that reason the findings of The Tax Court were contrary to the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Internal Revenue Code:

“SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

. . .

(c) **Transfers in Contemplation of, or Taking Effect at Death.**—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . .

(d) **Revocable Transfers.**—

. . .

(2) **Transfers on or Prior to June 22, 1936.**—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . . ”

Regulations 105:

“SEC. 81.16 **Transfers in contemplation of death.**—Transfers in contemplation of death made by the

decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

“The phrase ‘contemplation of death,’ as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

“Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

“If the executor contends that the value of a transfer of \$5,000 or more made by the decedent

subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate."

**“SEC. 81.17 Transfers intended to take effect at or after the decedent's death.**—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is 'intended to take effect in possession or enjoyment at or after his death', and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be

obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.”

. . .

## STATEMENT

The facts as found by The Tax Court are set out in Transcript of Record, pages 113-126.

Opening statements were made on behalf of each of the parties by their respective counsel. By STIPULATION OF FACTS, which was received in evidence and refers to Joint Exhibits Nos. 1-A to 14-N inclusive, it was agreed by the parties that the facts as set out in the said stipulation would be accepted as true, reserving to either party the right to introduce any proper evidence not inconsistent therewith (R. 23-28, 113). Petitioner's Exhibits Nos. 15 to 21 inclusive were marked for identification and Exhibits Nos. 15, 18, 19, 20, and 21, were received in evidence. Exhibit No. 16 was received in evidence and subsequently

rejected, exception noted, (R. 90, 91-94, 97, 99, 107, 110-112). Exhibit No. 17 was identified but not received in evidence, exception noted, (R. 95-97, 99, 107, 110, 111). Respondent's Exhibits lettered O (R. 54, 77, 78) and P (R. 102) were introduced and received in evidence.

### **SYNOPSIS OF EXHIBITS**

**JOINT EXHIBITS 1-A: FORM 706, TREASURY DEPARTMENT ESTATE TAX RETURN.** This Return was filed with the Collector of Internal Revenue of the Sixth District of California on or about May 15, 1945, and reported a total gross estate of \$5,406.27. After taking into consideration the allowable deductions and specific exemptions for the basic tax and for the additional tax, there was no net estate and therefore no Federal estate tax resulted. (Stip. Par. 1.) (R. 23, 112, 113.)

**JOINT EXHIBIT 2-B: TRUST INDENTURE** dated March 24, 1928. The pertinent parts of this instrument, as far as this case is concerned, are: Paragraph 1 conveying decedent's property; Paragraph 5—distribution of net income of the trust; Paragraph 6—termination of the trust; Paragraph 7—insufficiency of income and provision for payment from corpus for the comfort, well-being or education of any of the beneficiaries of the trust, if such beneficiary had no other means sufficient for the purpose, then upon representation and

proof of such fact to a court of competent jurisdiction and upon order of such court resort may be had to the corpus of the trust estate to the extent necessary to relieve the situation and the amount charged to the respective beneficiary; and Paragraph 9—trust irrevocable, new trustee, restriction of trustee to an incorporated trust company authorized to do business in the State of California. (Stip. Par. 4.) (R. 13-21, 24.)

**JOINT EXHIBIT 3-C: COMPLAINT FOR DECLARATION OF RIGHTS UNDER TRUST INDENTURE AND FOR EQUITABLE RELIEF**, filed on February 6, 1941, by trustor and her two children, in the Superior Court of the State of California in and for the County of San Diego, against the San Diego Trust and Savings Bank, then trustee under the said trust, for the purpose of authorizing the trustee under its power or discretion to make investments of a type or kind more liberal than authorized in the original trust indenture. (Stip. Par. 6.) (R. 24.)

**JOINT EXHIBIT 4-D: ANSWER** (to plaintiff's complaint) filed by the San Diego Trust and Savings Bank, February 25, 1941. (Stip. Par. 7.) (R. 25.)

**JOINT EXHIBIT 5-E: DECREE** Superior Court made March 13, 1941, which authorized the trustee under its power or discretion to make investments of a type or kind more liberal than set out in the original trust indenture. (Stip. Par. 8.) (Set aside by Decree made April 21, 1941, Joint Exhibit 7-G.) (R. 25.)

JOINT EXHIBIT 6-F1: NOTICE OF MOTION TO VACATE AND SET ASIDE JUDGMENT AND ENTER JUDGMENT IN LIEU THEREOF, dated April 19, 1941, on grounds of mistake and inadvertence. (Stip. Par. 9.) (R. 25.)

JOINT EXHIBIT 6-F2: AFFIDAVIT, dated April 19, 1941, in support of motion. (Stip. Par. 9.)

JOINT EXHIBIT 7-G: DECREE of the Superior Court made April 21, 1941, which set aside Decree in said matter made March 13, 1941, Joint Exhibit 5-E. Joint Exhibit 7-G amended paragraph 3, subdivision (a) of said trust indenture which further enlarged the power or discretion of the trustee to invest and reinvest the funds of the said trust. (Stip. Par. 10.) (R. 25.)

JOINT EXHIBIT 8-H: PETITION FOR ORDER ALLOWING PAYMENT FROM CORPUS OF TRUST, filed May 27, 1943, in the Superior Court of the State of California in and for the County of San Diego, to allow payment to the trustor under said trust indenture up to \$300 a month, to be paid out of income if sufficient, any balance out of corpus. (Stip. Par. 11.) (R. 25.)

JOINT EXHIBIT 9-I: ORDER ALLOWING PAYMENT FROM CORPUS OF TRUST, made June 11, 1943, by the Superior Court, wherein the trustee is authorized and directed to make monthly payments to the beneficiary, DELL M. HIGGINS, in the sum of Three

Hundred Dollars (\$300.00) per month, paying out of income if sufficient, if not any balance out of the corpus of the trustee estate as may be necessary to make such monthly payments until further order of the Court. (Stip. Par. 12.) (R. 25.)

JOINT EXHIBIT 10-J: PETITION FOR ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF TRUST, filed October 25, 1943, in the Superior Court, to direct the trustee to increase payments to the trustor from \$300 a month to \$445 a month from income if sufficient but if insufficient balance to be paid out of corpus. (Stip. Par. 13.) (R. 26.)

JOINT EXHIBIT 11-K: AMENDMENT TO PETITION FOR ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF TRUST, filed November 19, 1943, in the Superior Court, which added to the prayer of the petition, Exhibit 10-J, as follows: "or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance." (Stip. Par. 14.) (R. 26.)

JOINT EXHIBIT 12-L: ORDER ALLOWING ADDITIONAL PAYMENT FROM CORPUS OF THE TRUST, made November 19, 1943, by the Superior Court, in which it ordered the trustee to make monthly payments to the beneficiary, Dell M. Higgins, or her order, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, in the sum of \$445, pay~~ment~~<sup>ing</sup> thereon the net income from said trust and in addition thereto such

part of the corpus of the trust estate as may be necessary to make such monthly payments continuing until further order of the Court. (Stip. Par. 15.) (R. 26.)

**JOINT EXHIBIT 13-M: AFFIDAVIT** setting forth that the following items were paid out of the principal of the trust:

4/10/45	Bradley-Woolman Mortuary funeral expenses . . . . .	\$ 574.94
8/22/45	W. S. Heller, County Treasurer, California State Inheritance Tax in matter of Estate of Dell Hinds Higgins, deceased, per order of fixing Inheritance Tax dated 8-1-45 . . . . .	\$3,262.44

(Stip. Par. 16.) (R. 27.)

**JOINT EXHIBIT 14-N: INVENTORY OF TRUST** No. 5611 AS OF THE DATE OF DEATH, MARCH 3, 1945, DELL M. HIGGINS, TRUSTOR, shows there was \$188,302.40 in said trust at the time of trustor's death, March 3, 1945. (Stip. Par. 17.) (R. 27.)

**PETITIONER'S EXHIBIT 15: PASS BOOK**, Savings Account No. 80159 with Southern Trust and Commerce Bank which shows \$5,000 was drawn on April 2, 1928, to get Samuel Harrow, husband of Dell M. Harrow, out of the family in a hurry (R. 88, 89, 90, 105, 106, 117); \$15,000 transferred to the trustee under the trust indenture dated March 24, 1928, (R. 90, 106, 117); and withdrawal of the balance of the account on

April 3, 1928, by Dell M. Harrow (subsequently Dell M. Higgins), in the sum of \$418.51. (R. 90, 106, 117.)

PETITIONER'S EXHIBIT 16 was received in evidence and subsequently rejected, exception noted, (R. 90, 91-94, 97, 99, 107, 110-112): COMPLAINT FOR DIVORCE, SAMUEL HARROW, Plaintiff, vs. DELL M. HARROW, Defendant, filed June 6, 1928, in the Superior Court of the State of California in and for the County of San Diego, wherein plaintiff alleges "Defendant treated Plaintiff with extreme cruelty, the course of which treatment gradually grew worse and worse until the ends and objects of matrimony as between said parties were utterly destroyed, and caused Plaintiff great worry and mental anguish.

"That some particulars of said wrongful conduct are as follows:

"That Defendant was possessed of considerable means in her own right at the time of said marriage, while Plaintiff was a man of ordinary means and dependent upon his own earnings for a livelihood; that though Defendant knew said facts at and before the time of said marriage, yet subsequent to the date hereof said difference in financial standing became a constant source of friction between said parties, and a constant source of nagging of Plaintiff by Defendant to his great embarrassment and humiliation; that said attitude of Defendant was aggravated by a like attitude on the part of her children by a former marriage,

whose actions in said regard were upheld by Defendant; that said attitude on the part of Defendant became so exaggerated as to amount to an obsession with her which led her to extreme antagonism with the results aforesaid.

“That said obsession on the part of Defendant led her into such extremes that she took steps to secrete her money and funds from Plaintiff. That on one recent occasion by reason of said obsession and unfounded suspicion that Plaintiff was thus attempting to gain control of Defendant’s funds she, the said Defendant, caused the Plaintiff to be locked out of her room, and on another recent occasion caused her room to be changed at a hospital where she had been staying, and where Plaintiff was in the habit of calling on her.”

PETITIONER’S EXHIBIT 17: COMMISSION TO TAKE DEPOSITION OF MARY MOUNTAIN, CERTIFICATE, AND DEPOSITION OF MARY MOUNTAIN, offered in evidence, objected to by respondent, objection sustained, exception noted. (R. 95-97, 99, 107, 110, 111.) The object and purpose in requesting the said instrument to be submitted in evidence was to show the reason for the creation of the trust March 24, 1928, Joint Exhibit 2-B, as a part of the said deposition reads as follows, to wit:

“6. Q. What, if anything, did you observe regarding Defendant’s attitude toward Plaintiff on money matters?

A. She had the idea in her head constantly that Mr. Harrow was trying to get her money and talked about it all the time, and was always afraid Mr. Harrow would try to get her to sign a check for a large amount of money, and was afraid he would do her physical harm."

"9. Q. Did Defendant ever discuss with you, or did you ever learn of any attempt on the part of Defendant to place her money or funds out of reach or control of Plaintiff—if so, state briefly the circumstances?

A. Yes, Mrs. Harrow had me go into the Bank of Italy at San Diego and arrange with the Bank to have all her business and money handled through their Trust Department."

PETITIONER'S EXHIBIT 18: INTERLOCUTORY JUDGMENT BY DEFAULT IN ACTION FOR DIVORCE, July 5, 1928, by the Superior Court. (R. 96, 97.)

PETITIONER'S EXHIBIT 19: FINAL JUDGMENT OF DIVORCE, made July 6, 1929, by the Superior Court. (R. 97.)

PETITIONER'S EXHIBIT 20: PETITION filed in the Superior Court July 29, 1929, to change the name of petitioner from Dell M. Harrow to Dell Hinds Higgins. (R. 98.)

PETITIONER'S EXHIBIT 21: ORDER CHANGING NAME, made August 30, 1929, by the Superior Court, changing petitioner's name from Dell M. Harrow to Dell Hinds Higgins. (R. 98.)

**RESPONDENT'S EXHIBIT O: AFFIDAVIT OF SYDNEY M. HIGGINS**, dated April 23, 1946. This exhibit is of no importance other than there was a general misinterpretation placed upon it both by Counsel for the Respondent and the Court, which materially upset the witness because of his difficulty in hearing. (R. 54, 78.)

**RESPONDENT'S EXHIBIT P: AFFIDAVIT OF HELEN B. KENDALL**, dated April 30, 1946. (R. 102.) An erroneous interpretation was placed upon the intent of the language of the affidavit by Counsel for the Respondent and the Court.

### **STATEMENT OF EVIDENCE**

**(From Stipulation of Facts (R. 23-28), Memorandum Findings of Fact (R. 113-126), Exhibits, and Oral Testimony of Sydney M. Higgins and Helen B. Kendall, Son and Daughter of Trustor (R. 30-112).)**

Dell Hinds Higgins, the decedent, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. Petitioner filed a Federal estate tax return, Joint Exhibit 1-A, with the collector for the sixth internal revenue collection district of California on May 15, 1945. (R. 23, 113.) The return so filed did not disclose a net estate. (R. 113.)

Decedent and her two sisters had been the beneficiaries of the estate of their parents which included a

building in Seattle, Washington. The estate formed a corporation called Hinds Estate, Incorporated, to operate the building, and decedent became vice-president of that corporation at a salary of \$70 per month. (R. 72, 73, 114.)

In 1887 decedent married Albert Edward Higgins. They had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913. Both of their children are still living. (Stip. Par. 2.) (R. 23, 24.) Sydney has three children (R. 76, 114), and Helen has one child (R. 100, 114).

Albert Higgins left no will at the time of his death. (R. 49, 114.) Both Sydney and Helen were of age at that time and never claimed any share of the estate which went in its entirety to decedent. (R. 49, 114.) A part of the estate of Albert Higgins rightfully belonged to Sydney and Helen and that was the reason they each received \$75 a month from the trust dated March 24, 1928. (R. 41, 49.)

In about 1903 decedent almost died of pneumonia. (R. 46, 114.) In 1918 she fell and injured her hip, and for the remainder of her life she was not able to walk well. (R. 47, 114.)

In 1919 Sydney Higgins met Samuel Harrow, who was employed by a jewelry firm, Jessop's, in San Diego; he didn't know how long his Mother had known

Harrow, or the kind of work he did (R. 43, 44); Harrow was not married, and was eight or nine years older than decedent. After knowing Harrow for six years or more, decedent married him on April 9, 1925. (Stip. Par. 3.) (R. 24, 45, 114.) Decedent wanted companionship and did not want Harrow to work. (R. 45, 114.) After they were married he resigned his position with the jewelry firm and became financially dependent upon decedent. (R. 37, 44, 114.) Thereafter, controversies arose relating to money matters. Harrow plagued and harrassed decedent for money and caused her to become highly nervous. (R. 32, 47, 88.) She became afraid of Harrow, who would take her past cemeteries and hospitals and tell her that that was where he was going to put her. He constantly made demands upon her for money and kept her in an agitated mental condition. She had a constant fear that Harrow was going to cause her death in order to get her money. (R. 33, 49, 50, 55.) (R. 115.)

A few months before March 24, 1928, when decedent created the trust here in question (R. 48), she went to Paradise Valley Sanitarium at National City, near San Diego, California. (R. 33, 34, 47.) She desired to get away from Harrow. (R. 34, 50, 56.) (R. 115.)

On the evening of March 19, 1928, a doctor at Paradise Sanitarium called Sydney and requested him to come to the sanitarium immediately because Harrow had been coming there frequently and disturbing decedent by making demands upon her for advances of

money, and that on that morning decedent had walked downstairs from her room and was sitting out in the front garden when Harrow came; that while he was conversing with her he suddenly stepped off a few feet and threw a bunch of keys at decedent, hitting her in the face. The keys cut her. (R. 32, 33.) The reason for Harrow throwing the keys was that he had brought certain papers to the sanitarium for decedent to sign giving him all of her property and it was her refusal to sign the papers that caused him to get angry and throw the keys which hit decedent. (R. 34, 58.) Sydney went to his mother at once. (R. 33.) She was in a nervous and upset condition; she cried frequently and her digestive system was upset. (R. 34, 86, 87, 102, 107, 108, 110, 115.) Although there is testimony in the record that the decedent was seriously ill at the time the trust was created, March 24, 1928, (R. 56, 79-84) it is definitely shown by the record that she was not ill in the sense that there was any anticipation of her death. (R. 38, 46, 47, 88, 101.) She was not confined to her bed, she did not have a special nurse or doctor at the sanitarium (R. 47), she was up and about and walked out to the garden. (R. 33, 51.) She went to the sanitarium to get away from her then husband, Samuel Harrow, and to rest. (R. 34, 47.) She was, as a person always is in a sanitarium, under the care of the resident physician while she was at the sanitarium. (R. 109, 110.) (R. 115.)

She left the sanitarium within a month or two, having improved rapidly after she created the trust, as hereinafter related. (R. 82, 109, 116.)

After Sydney and decedent talked the matter over, Sydney went into San Diego and met an attorney whom he knew. He consulted with the attorney on the problem and the attorney suggested the creation of a trust to put decedent's property beyond her control or anybody else's control, to meet the situation. (R. 34.) Numerous conversations were had between decedent and her attorney. (R. 116.) Sydney was present at the conferences. (R. 35.) Decedent expressed her intention to divest herself of all her property and in such manner that it would not be subject to Federal estate tax. (Respondent's Exhibits O, P.) (R. 116.) In preparation of the trust agreement, decedent, Sydney, Helen, and the attorney discussed the making of the trust absolutely irrevocable, in order that there should be no Federal estate tax charge against it, and the attorney prepared the trust under the law then in force and advised decedent that it would not be subject to estate tax. (Respondent's Exhibits O, P.) (R. 116.)

Sydney and Helen were interested in the property that went into the trust and felt that part of it belonged to them since it had been left by their father. Decedent willingly recognized this fact in making provision in the trust for the children, so that each of them received \$75 a month from the income of the said trust. (R. 41, 49, 116.)

The entire matter was handled expeditiously, and on March 24, 1928, decedent executed the trust instrument. (R. 83, 116.) During this time decedent was in a nervous and upset condition, but she made no remarks of expecting death or being near death. (R. 38, 88, 108, 110.)

Decedent was a good business woman and did not want to sign the trust since she realized that by doing so she would lose complete control of her property. However, she felt it was the only way to get free from the demands of Harrow and to prevent him from obtaining any part of her property. Decedent transferred everything she owned to the trust, except her car, jewelry, and her salary of \$70 per month as vice-president of the Hinds Estate, Incorporated, and \$5,418.51 of her savings account with the Southern Trust and Commerce Bank of San Diego, \$15,000 being drawn from this account and placed in the trust. Of the balance, \$5,000 was withdrawn and paid to Harrow as a property settlement in connection with the divorce action which he was bringing. Petitioner's Exhibit 15.) (Stip. Par. 4. R. 24.) (R. 37, 75, 88, 105, 106, 116, 117.)

The Bank of Italy National Trust and Savings Association was named trustee of the trust. (R. 13, 117.) Its duties and powers as trustee included the following:

- a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest

all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth. (Joint Exhibit 2-B, Par. 3-a.) (R. 14, 117.)

. . .

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them. (Joint Exhibit 2-B, Par. 3-e.) (R. 15, 16, 118.)

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor. (Joint Exhibit 2-B, Par. 3-f.) (R. 16, 118.)

With respect to the current net income, the Trust indenture provided as follows:

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the trustor:

- a. Seventy-five Dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.
- b. Seventy-five Dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.
- c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

(Joint Exhibit 2-B, Par. 5.) (R. 16, 17, 118, 119.)  
 Sydney and Helen have each been receiving monthly payments as above provided. (R. 41, 119.)

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right

of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. (Joint Exhibit 2-B, Par. 6.) (R. 17, 119.)

The trust is declared to be irrevocable. (Stip. Par. 5.) (R. 24, 119.) However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authorized to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee. (Joint Exhibit 2-B, Par. 9.) (Stip. Par. 4.) (R. 19, 24, 119.)

Paragraph 7 of the trust indenture provides as follows:

If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts. (Joint Exhibit 2-B, Par. 7.) (R. 18, 119, 120.)

Decedent's marriage to Harrow was terminated by a final decree of divorce issued July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins. (Stip. Par. 3.) (R. 24, 120.)

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a of paragraph 3, *supra*, with respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the Court for invasion of corpus under paragraph 7, *supra*, would be required. (Joint Exhibit 3-C.) (Stip. Par. 6. R. 24.) (R. 120, 121.)

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the Court considered

proper in the premises. (Joint Exhibit 4-D, R. 25.) On March 13, 1941, the Court entered its decree changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth. (Joint Exhibit 5-E.) (Stip. Par. 8, R. 25.) (R. 121.)

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." (Joint Exhibits 6-F, 1 and 2.) (Stip. Par. 9, R. 25.) On April 21, 1941, the Court entered another decree again changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a *reasonably* high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in:—bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth. (Joint Exhibit 7-G.) (Stip. Par. 10, R. 25.) (R. 122.)

On May 27, 1943, decedent petitioned the Court for an order authorizing and directing the trustee to pay to her the sum of \$300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of \$225 per month for the succeeding twelve months “is insufficient to adequately provide for her comfort and well-being, and that she has no other means of support or other income.” No one appeared to oppose the granting of the relief prayed for (Joint Exhibit 8-H) (Stip. Par. 11, R. 25) and on June 11, 1943, the Court entered its order authorizing and directing the trustee to make the payment of \$300 per month “paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be neces-

sary to make such monthly payments until the further order of this Court." (Joint Exhibit 9-I.) (Stip. Par. 12, R. 25, 26.) (R. 122, 123.)

On October 25, 1943, decedent filed with the Court a Petition for Order Allowing additional payment from Corpus of Trust. The petition stated in part that in previously petitioning the Court for \$300 per month, a payment of \$75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only \$225 per month; furthermore, in the past sixty days, due to the pending liquidation of Hinds Estate, Incorporated, her salary of \$70 per month as vice-president had been discontinued. In praying for an order authorizing and directing the trustee to pay her \$445 per month (\$300 plus \$75 plus \$70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows:

That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before. (Joint Exhibit 10-J.) (Stip. Par. 13, R. 26.) (R. 123.)

On November 19, 1943, decedent filed with the Court an Amendment to Petition for Order Allowing Additional Payment from Corpus of Trust in which the prayer of her petition filed on October 25, 1943, was amended to read as follows:

WHEREFORE, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five (\$445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate. (Joint Exhibit 11-K.) (Stip. Par. 14, R. 26.) (R. 123, 124.)

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the Court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943. (Joint Exhibit 12-L.) (Stip. Par. 15, R. 26.) (R. 124.)

Pursuant to the Court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts:

1943 (subsequent to June 11)	\$ 624.06
1944	1,175.17
1945 (prior to decedent's death on March 3)	130.25
	<hr/>
Total payments out of corpus	\$1,929.48
	<hr/>

(Joint Exhibit 13-M.) (Stip. Par. 15, R. 26.) (R. 124.)

All of the Court proceedings detailed above were uncontested. Except for the original petition to alter, or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. (Joint Exhibits 3-C, 4-D, 5-E, 6-F, 1 and 2, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L.) Neither of the children ever requested an increase in their monthly payments of \$75 each from the trust; nor did they ever petition the Court for payments out of corpus. (R. 48.) No corpus was ever used for the benefit of either of the two children. (R. 124, 125.)

Subsequent to the death of decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—Bradley-Woolman Mortuary  
funeral expenses \$ 574.94

8/22/45—W. S. Heller, County Treasurer California State Inheritance Tax in matter of Estate of Dell Hinds Higgins, deceased, per order of fixing Inheritance Tax dated 8-1-45 \$3,262.44

(Joint Exhibit 13-M.) (Stip. Par. 16, R. 27.) (R. 125.)

In the Federal estate tax return the funeral expenses in the amount of \$574.94 were included in the total deductions claimed of \$2,477.38. (Joint Exhibit 1-A.) (R. 125.)

The property comprising the trust estate on the date of decedent's death consisted of bonds, preferred and common stocks, and \$1,539.81 in cash, making an aggregate total of \$188,302.40. (Joint Exhibit 14-N.) (Stip. Par. 17, R. 27.) (R. 125.)

At the time of her death decedent owned only her car, her jewelry, and cash in the amount of \$1,980.27. Decedent's last will, dated April 8, 1940, reads as follows:

I give to my daughter HELEN B. KENDALL all my clothes, ornaments, everything in my home, except the jewelry I have already willed to others,—for her to take and keep as her own. All my things in Helen's home are to be hers also.

(Joint Exhibit 1-A.) (Stip. Par. 18, R. 27, 28.) (R. 125, 126.)

## SUMMARY OF EVIDENCE

Dell Hinds Higgins, also known as Dell M. Harrow, also known as Dell M. Higgins, decedent, trustor, was born May 31, 1869, created irrevocable trust indenture March 24, 1928, died March 3, 1945. Married Albert Edward Higgins in 1887, they had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913, left property to which Sydney and Helen were entitled to a part, although they did not at the time claim it, it went to decedent. Both children are still living. The trust indenture made provision for \$75 per month for each of the children out of the income of the said trust. On April 9, 1925, decedent married Samuel Harrow.

The impelling cause of the trust indenture of March 24, 1928, was motivated by purposes associated with life, namely, to place trustor's property in a position so that her then husband, Samuel Harrow, could not get any part of it. Immediately after the property was placed in trust, decedent made settlement with him for the sum of \$5,000. Subsequently, on July 5, 1928, he obtained an interlocutory judgment by default in an action for divorce against decedent.

At the time the trust was created trustor was not in bad health, made no mention of anticipating, ex-

pecting, or being near death, and lived for seventeen years thereafter. Her only serious illness prior to her death was in 1903 at which time she had pneumonia. She was alert and a good business woman, she resented signing the trust as in so doing she lost complete control of her property. Trustor was advised by her attorney and the trustee Bank that the property conveyed or transferred to the trust would not be subject to Federal estate tax.

### **SPECIFICATION OF ERRORS RELIED UPON**

(1) The Findings of Fact of The Tax Court are not supported by the evidence;

(2) The failure to hold the transfer of the corpus of the trust of March 24, 1928, was an inter vivos transfer, and not made in contemplation of death;

(3) The failure to hold that the transfer was inter vivos and was intended to take effect in possession or enjoyment at the time it was made, namely, March 24, 1928, within the meaning of Internal Revenue Code, section 811(c);

(4) The failure to hold that the decedent did not reserve the power to limit, amend, transfer, or revoke the trust within the meaning of the Internal Revenue Code, section 811(d);

(5) The failure to determine that the transfer of the gift was made prior to March 3, 1931, and the value of the property of the trust was for that reason not subject to estate tax;

(6) The failure to hold that said gift was made for a purpose connected with life: namely, to divest herself of the property so that her then husband could not get it and for that reason not subject to estate tax;

(7) The failure to find that the gift could not have been made in contemplation of death as the trustor was in normal health at the time the trust was created, March 24, 1928, and lived seventeen years thereafter;

(8) The failure to find that the property of the trust was not subject to estate tax pursuant to section 811(c) and/or section 811(d) of the Internal Revenue Code as both sections became effective subsequent to the effective date of the trust, March 24, 1928, were not retroactive and for that reason the decision was contrary to the Fifth and to the Fourteenth Amendments to the Constitution of the United States of America;

(9) The failure to find the Trustor did not retain a string on the corpus of the trust property;

(10) The failure to hold that there was no possibility of the trust property reverting to the trustor;

(11) The failure to determine the trustor only reserved a part of the income of the trust property to herself as a definite amount of the income was at the time the trust was created given to her daughter Helen and her son Sydney;

(12) The failure to find the trust indenture was irrevocable and the trust property passed completely out of the control of the trustor;

(13) The failure to hold the trustor's estate possessed no right or interest in the trust property at the time of the trustor's death as the transfer of the trust property passed on March 24, 1928, at the time the trust was created.

### SUMMARY OF ARGUMENT

The Findings of Fact and Opinion of The Tax Court are not supported by the evidence in this cause, as it was determined on the basis of *Commissioner v. Estate of Church*, 335 U. S. 651, 69 S. Ct. 337, *Estate of West v. Commissioner*, 9 T. C. 736, *Estate of Durant v. Commissioner*, 41 B. T. A. 462, and *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 69 S. Ct. 301, and the facts in the instant cause are distinguishable from the *Church*, *West*, *Durant*, and *Spiegel* cases. In the instant cause the decedent was not a trustee, she did not retain the entire income to herself, a part of it was first set aside to her daughter and her son, therefore, possession and enjoyment passed as an inter vivos transfer at the time of the conveyance of the property, March 24, 1928, the corpus of the trust could not be invaded by any of the beneficiaries of the trust, under no circumstances did she retain to herself a reversionary interest. Upon her death and upon the death of both of her children, Sydney and Helen, the corpus is to be distributed one half to the issue of Sydney and one half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go

to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. It is the contention of the petitioner that neither that part of the trust estate from which the decedent retained the income to herself nor that part of it which was set aside to her son and daughter is subject to Federal estate tax.

In the decision of The Tax Court, section 811, subsections (c) and (d) of the Internal Revenue Code was given consideration, which is in direct contravention to the Fifth and to the Fourteenth Amendments to the Constitution of the United States of America, as the transfer was made prior to March 3, 1931, the date of the Joint Resolution of Congress which changed the law under the Revenue Act of 1926, section 302(c), under which section the evidence shows the transfer was made for purposes connected with life, Dell Hinds Higgins, the trustor, had no power to invade the corpus of the trust property, the trust was irrevocable, under the law applicable at the time of the creation of the trust it was not subject to Federal estate tax.

Although The Tax Court did not decide the question involved as to whether or not the transfer was made in contemplation of death, the evidence very definitely shows that the trust was motivated by purposes associated with life, namely, to place trustor's property in a position so that her then husband, Samuel Harrow, could not obtain any part of it, that the trustor was not in bad health, that she was alert and a 'good busi-

ness woman at the time the trust was created, March 24, 1928, and lived for seventeen years thereafter, all of which overwhelmingly supports the contention of the petitioner that the trust was not made in contemplation of death.

## ARGUMENT

### **The Record Completely Fails to Support the Determination of the Tax Court, as the Four Cases, Church, West, Durant, and Spiegel, Which Constitute the Basis of Its Decision are Distinguishable From the Instant Case.**

In the Opinion of The Tax Court it cites four cases, namely, *Commissioner v. Estate of Francois L. Church*, 335 U. S. 651, 69 S. Ct. 337; *Estate of Virginia H. West v. Commissioner*, 9 T. C. 736; *Estate of Norma P. Durant v. Commissioner*, 41 B. T. A. 462; and *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 69 S. Ct. 301.

Each of the above cases are clearly distinguishable from the cause now before the Court. Counsel will take each of the cases in order and distinguish it from the cause now before this Court.

In the first case, *Church* executed a trust in the state of New York during the year 1924. He was then 21 years of age, unmarried and childless. He and two of his brothers were named co-trustees. Certain corporate stock was transferred to the trust with grant of power to the trustees to hold and sell stock and rein-

vest the proceeds. *Church* reserved no power to alter, amend, or revoke the trust but required the trustees to pay him the income for life. He died in 1939. The trust terminated. It contained some directions for distribution of the assets when he died. These directions as to final distribution did not provide for all possible contingencies. If *Church* died without children and without any of his brothers or sisters or their children surviving him, the trust instrument made no provision for the disposal of the trust assets. The Commissioner's contention was that, under New York law, had there been no surviving trust beneficiaries, the corpus would have reverted to decedent's estate.

In the instant cause (*Higgins*), the trust was executed March 24, 1928, the trustor selected a corporate trustee with the right to appoint a new and different trustee, with the restriction that the new trustee must be a corporate trust company authorized to do a trust business in the State of California under the laws of the State of California or under the laws of the United States. The trustor reserved no power to alter, amend, or revoke said trust and the trustee was required during the lifetime of the trustor to pay out of the net income of the trust estate \$75 per month to her daughter, Helen B. Kendall, or, if she should die, to her issue by right of representation, and \$75 per month to her son, Sydney M. Higgins, or, if he should die, to his issue by right of representation, and the entire balance of the net income of the trust estate to the trustor. After the death of the trustor, the entire income of

the trust estate in equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of the said beneficiaries, to the issue of the deceased beneficiary by right of representation. The trust instrument contained the provision that it should terminate upon the death of the survivor of the trustor, her daughter, Helen B. Kendall, and her son, Sydney M. Higgins. Upon the termination of the trust, the entire corpus of the trust estate shall go to and be distributed among the issue of Helen B. Kendall and Sydney M. Higgins by right of representation. In the event there is no living issue of either one or the other of Helen B. Kendall and Sydney M. Higgins at the time of the termination of the trust, then the entire corpus of the trust shall go to the issue of the other, and if there is no issue of either Helen B. Kendall or Sydney M. Higgins living at the time of the termination of the trust, then the entire corpus of the trust estate shall go one-half to each of the respective heirs at law of Helen B. Kendall and Sydney M. Higgins. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

In the *Church* case, *Church* was one of the co-trustees. In the *Higgins* case there was a corporate trustee. The trustor in neither case reserved the power to alter, amend, or revoke the trust. In the *Church* case, the trustor required the income to be paid to him for life. In the *Higgins* case, after payment of \$75 a month to each of her two children, the trustor received the residue of the income, therefore the trustor parted with possession and enjoyment of the property at the date

the trust was created. In the *Church* case, under the New York law, there was no final disposition of the trust assets. In the *Higgins* case, the final disposition of the assets was one-half to each of the respective heirs at law of Helen B. Kendall and Sydney M. Higgins, the daughter and son respectively of the trustor. (Joint Exhibit 2-8, R. 13-21.) (Stip. Par. 4, R. 24.)

In the *West case, supra*, p. 736, at 739, The Tax Court stated in its Opinion:

“Here the trust provided external standards. The trustees were authorized to encroach upon the corpus for the decedent’s ‘proper maintenance and support’ and for ‘any emergency which may arise affecting her, occasioned by sickness, accident, ill health, affliction, misfortune, or otherwise.’ These standards imposed a limit upon the Trustees’ discretion to act ‘as they may consider reasonable and necessary.’ We think the trust provided an enforceable right to have the corpus thereof invaded for the decedent’s benefit.”

Date trust created: November 9, 1926. Trustor died December 16, 1941.

In the instant case, neither trustor nor trustee had the right to invade the corpus of the trust for the benefit of the trustor or any of the beneficiaries. Article 7 of the Higgins trust, formerly the Harrow trust, provides as follows:

“7. If it should happen during the continuance of this trust that the net income of the Trust

Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.”

Under such provisions no clear external standard was set, nor was the trustor the only person who could apply for relief under the said Article 7. Any one of the beneficiaries might apply, however, the relief sought was limited and left to the sound discretion of a court of competent jurisdiction and was not an enforceable right. It should be observed that in *Estate of West, supra*, trustor was a co-trustee, whereas in the instant case there was a corporate trustee and said trustee had no power or discretion to grant relief. Only a court of competent jurisdiction had the untrammelled power to grant the relief to the extent necessary to relieve the situation as provided for in Article 7 of said trust indenture. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

Regarding the *Durant* case, *supra*, the trust was created March 30, 1926, trustor died August 24, 1935. The trust instrument in the *Durant* case provided that

she was to receive \$1,250 monthly out of the income and if the income was insufficient to pay said amount, out of the corpus of the property turned over to the trustee, for and during her natural life or until the property turned over to the trustee and the income therefrom had been paid over to the said Norma P. Durant. It further provided that if \$1,250 was insufficient in the judgment of said trustee to properly provide for the comfort, maintenance, and enjoyment of life by said Norma P. Durant, the said sum to be paid monthly to her be increased to such sum as in the opinion and judgment of said trustee is proper. And in addition to the monthly provision for maintenance etc., any further sum or sums of money for the purpose of traveling, or purchasing a home or other real estate solely, however, for her own use and enjoyment, and the trustee may further pay to the said Norma P. Durant money for other purposes which in the opinion and judgment of said trustee it may be advisable to pay her in view of all existing conditions and circumstances. The agreement provided that, upon the death of the trustor, the trustee should ascertain and pay all of the just debts of the said Norma P. Durant. It also provided for the disposition of the residue in a comparable manner, and in a large measure in identical language, with decedent's Will executed December 22, 1925. The facts also show that the value of the trust corpus on March 30, 1926, the date of its creation, was \$55,950. There was added thereto on October 24, 1928, securities and other property to the value of \$78,730.88.

From the date of the creation of the trust, March 30, 1926, to the date of decedent's death, August 24, 1935, there was paid to the decedent \$61,365.69 from the income received from the trust, and \$70,516.50 from the principal of the trust, making a total payment of \$131,882.19. The Tax Court in its Opinion stated, at the bottom of page 464:

“Powers residing in the decedent either alone or at least in conjunction with the trustee were such that the amendment, revocation, or alteration of the trust was in reality retained by decedent until the time of her death. The stipulated monthly payments were obviously materially in excess of any anticipated income from the property. It resulted, and must have been contemplated, that periodic invasions of principal would be necessary. Only decedent's refusal to accept such fragmentary distributions of principal could prevent the estate from being dissipated in its entirety. In fact, in the period of less than ten years of the trust's operation approximately 50 percent of the principal was so disbursed. At the same rate it would not have lasted for ten years more. Again, the primary obligation of the trustee upon decedent's death was to pay all of her debts, so that by the simple expedient of obtaining by loans or advances such amounts of principal as she might see fit she could effectively prevent all or any part of the property from passing to the remaindermen.”

There is no similarity between the facts in the *Durant* case and those in the *Higgins* case. In the *Durant* case, the trustee had wide and untrammelled discretion, whereas in the *Higgins* case the trustee had no discretion but the sound discretion rested in a court of competent jurisdiction and was then very limited as to any benefit which might be obtained by any of the beneficiaries under the trust, as provided in Article 7 of said instrument. (Joint Exhibit 2-B, R. 13-21.) (Stip. Par. 4, R. 24.)

Summary of the *Durant* trust: It appears that the trust was created merely for the purpose of selecting someone to act in an advisory capacity, make investments, and keep books of account for the trustor. And, further the trust indenture for all intents and purposes corresponded with her last Will and Testament made December 22, 1925.

It is difficult to understand why the Court cited the *Spiegel* case, as this involved a trust created in the year 1920 which included the settlor's gross estate wherein there was a possibility of a reverter to the settlor by operation of the law. In the instant case, The Tax Court stated in its Opinion:

“. . . And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner*, 335 U. S. 701, January 17, 1949.”

In the *Higgins* case there was no possible reversion to the trustor, whereas it was held in the *Spiegel* case there was a reversion to the grantor. Provision is made, as set out in the trust indenture (Joint Exhibit 2-B, Article 6, R. 17), that if neither the daughter nor son of the trustor should leave issue, then the trust property in the final analysis would go one-half to the heirs at law of Helen B. Kendall and one-half to the heirs at law of Sydney M. Higgins, which clearly shows that there was no intent of the trustor to reserve for herself a contingent reversionary interest in the trust. Our contention is that the trustor, so far as title to the corpus of the trust is concerned, made a *bona fide* transfer of the property in which the trustor absolutely, unequivocally, irrevocably, and without possible reversion parted with all of her title and all of her physical possession or enjoyment of the property transferred on March 24, 1928. That after the transfer had been made, the trustor was left with no legal title in the property, no possible reversionary interest in the property, and no right to possess or enjoy the property then or thereafter. After the execution of the trust, the trustor held no right in the trust estate which in any sense was the subject of testamentary disposition. The said trust indenture was in no way associated to a will. The transfer of the title to the property was unaffected subsequent to March 24, 1928, whether the grantor lived or died.

The Tax Court in the *Higgins* case said: "Our conclusion that the trust is taxable as part of decedent's

estate for the reasons given eliminates the necessity of considering the alternative contention of a transfer in contemplation of death." It is evident that the trust was not created, nor the property transferred to the trust, in contemplation of death, but on the contrary was actuated by motives associated with life, as the objects and purposes of the trust were to place the trustor's property beyond any possible control of her then husband, Samuel Harrow, who plagued and harassed her for money and caused her to become highly nervous (R. 32, 47, 88) and would take her past cemeteries and hospitals and tell her that was where he was going to put her. He constantly made demands upon her for money and she was in constant fear that he would cause her death in order to get her money. (R. 33, 49, 50, 55.) (R. 115.) Although a good business woman, enjoyed handling her own business matters and property, she consented to place her property in trust so that her then husband, Samuel Harrow, could not obtain it. (R. 75, 88, 116, 117.) She was approximately 59 years of age at the time she created the trust, 17 years later she died at the age of approximately 76 years. (R. 12, 23.)

At the date the trust was created, there was no law requiring a Federal gift tax. In fact, there was no Federal gift tax act for the period January 1, 1926, to June 2, 1932.

On April 14, 1930, in the case of *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, the Supreme Court in its

Opinion laid down the rule that where the donor reserved the income for life, transfer was not made in contemplation of death within the legal significance of those words and not testamentary in character and was beyond the recall of the trustor, that at the date of the death of the trustor no interest passed from the decedent to the living; title thereto had been definitely fixed by the trust deed, the property was not to be included in the donor's estate for Federal estate tax purposes. (In the cause before the Court, the trust was not made in contemplation of death, the property was beyond the recall of the trustor, and title to the property passed on the date of the trust instrument, namely, March 24, 1928.) The law was immediately changed after this decision by a Joint Resolution of Congress, March 3, 1931, amending section 302(c) of the 1926 Revenue Act, now section 811(c) of the Internal Revenue Code, to include, among others, transfers "under which the transferor has retained for his life . . . (1) the possession or enjoyment of, or the income from, the property" transferred. This change in the law was held not to have retroactive effect in *Hassett v. Welch* (1938), 303 U. S. 303, 58 S. Ct. 559, and many other cases, and to be applicable only to transfers made on or after March 3, 1931.

Petitioner contends that section 811(c) is not applicable and quotes from *Hassett v. Welch*, *supra*:

"The history of the Resolution is of material aid in its construction. Section 302(c) of the Act of

1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of, or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition, this court held otherwise. (*May v. Heiner*, 281 U. S. 238, 50 St. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, construing section 402(c) of the Revenue Act of 1918, 40 Stat. 1057, 1097.) Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed. (*Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; *McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, construing section 402 (c) of the Revenue Act of 1921, 42 Stat. 278, and section 302(c) of the Revenue Act of 1924, 43 Stat. 304, 26 U. S. C. A. 411 note.) In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was 'no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved.' There then remained one day of the current session of Congress. The Treasury drafted an amendment of section 302(c) to bring

trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed, under a suspension of the rules, on the next day, the last of the session. (Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.)

“Because its passage was considered exigent, the Resolution was adopted without having been printed and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: ‘The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it.’ (Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198-7199.)

“Mr. Hawley of the same committee, in charge of the Resolution, stated, in answer to a question, ‘It provides that hereafter no such method shall be used to evade the tax’ and, referring to the situation created by the decisions of this court, he said: ‘It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under

which they will be enabled to escape the estate tax upon their property. It is of the greatest importance, therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.'

“This language, we think, scarcely bears the interpretation put upon it by Government counsel—that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

“Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the administrative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage. Promptly upon its passage the Department issued T. D. 4314, (C. B. X-1, 450), approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the Resolution, and stated:

“‘In view of the decisions of the Supreme Court of the United States in *Nichols v. Coolidge*, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081 (T. D. 4072, C. B. VI-2, 351), *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244 (Ct. D. 186, C. B. IX-1, 382), *Coolidge v. Long*, 282 U. S. 582, 51 S. Ct. 306, 75

L. Ed. 562; *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; *Edgar M. Morsman, Jr. v. Burnet*, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; and *Cyrus H. McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italics, will notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i.e., to such transfers coming within the amendment as were made *after* 10:30 p.m., Washington, D.C., time, March 3, 1931.

“‘Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.’ (Italics in the original.)”

That, further, the Joint Resolution of March 3, 1931, amendments thereto, and acts subsequently passed, have no retroactive application to the trust indenture of March 24, 1928.

Under the circumstances, petitioner contends that to include the trust property of \$188,302.40 as a part of the estate of the decedent and to determine a deficiency thereon in the sum of \$29,009.69 would violate the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Without admitting in any way that the *Church* and *Spiegel* cases, *supra*, are applicable hereto, but for the

sake of arugment only, we respectfully call to the Court's attention that on June 7, 1949, H. R. 5045 was introduced in the House of Representatives to amend section 811(c) of the Code with respect to the *Church* situation. This bill provides:

“That section 811(c) of the Internal Revenue Code is amended by striking out the semicolon at the end thereof and inserting a period, and by adding the following, effective as to estates of all decedents whether death occurred before or after passage of this Act: ‘Property transferred before 10:30 postmeridian, eastern standard time, March 3, 1931, shall not be included in the gross estate under this section by reason of the fact that the decedent retained an estate for life in such property.’ ”

And as for the *Spiegel* case, there was no possible reversionary interest in the property to the decedent Dell Hinds Higgins, so that the *Spiegel* case is not at all applicable to the instant cause.

“Lawyer's Weekly Report”, published weekly by Prentice-Hall, Inc., August 15, 1949, Volume 4 - No. 47, on the last page, makes the following statement:

“Legislation to Cover Church and Spiegel: The Senate Finance Committee has recommended that H. R. 5268 be passed with two important additions. The original proposals were described in our July 25th issue (p. 2, ‘Tax Relief’). The proposed additions:

1. Reinstate the status quo before the Church decision (335 U. S. 632). In other words, as to trusts created before March 4, 1931, the trust property would *not* be included in the creator's taxable estate merely because he had reserved a life estate in the property. The amendment would be made retroactive to Feb. 10, 1939 (when the Internal Revenue Code was enacted).

"2. Include only the actuarial value of the decedent's interest in property transferred during life where he retained a reversionary interest. This additional amendment is designed to relieve hardship in cases like *Spiegel* (355 U. S. 701). There, the decedent had a remote possibility of reverter in a million dollar trust fund. Actuarially his interest was worth only \$70, but the full value of the trust property was included in his estate for tax. This amendment would be effective only as to estates of person's dying after its adoption."

The Congress, public press, American Bar Association—Section of Taxation, tax services, estate and tax magazines, have all commented upon the harshness or hardship which will result from the rules laid down in the *Church* and *Spiegel* cases, and even the Commissioner of Internal Revenue has proposed to issue new regulations which would give relief under these two cases.

It is the contention of the petitioner that the trust created March 24, 1928, was not made in CONTEM-

PLATION OF DEATH but was actuated by motives associated with life; that the transfer of the property to the trust was intended to and did take effect in possession or enjoyment at the time the said trust was created; that the death of the trustor did not alter any of the interest created by the said trust; that title had been definitely fixed by the said trust indenture; that the trustor retained no strings upon the property placed in said trust; that the trustor did not retain the exercise of a power either alone or in conjunction with any one person to change the beneficiaries, to alter, amend, revoke, or terminate the said trusts; that the trustee was under no enforceable fiduciary obligation in the exercise of its discretion to pay the principal of the trust or any part thereof to the grantor; that the said trust instrument was not testamentary in character and was beyond recall by the trustor; that there was no external standard established whereby either the trustor or trustee could invade the corpus of the trusts; that any invasion of the trust rested in the absolute and uncontrolled discretion of a court of competent jurisdiction and was not an enforceable right; that at the time the trust was created, March 24, 1928, section 302(c) of the Internal Revenue Act of 1926 was the law applicable and imposed no tax upon the said trust; that the Joint Resolution of March 3, 1931, amendments to, and acts subsequently passed, have no retroactive application and trustor retained no strings by which she could regain possession or control of the trust property nor did her death alter any of the in-

terest created by the trust; that the Commissioner erroneously determined a deficiency of estate tax liability in the sum of \$29,009.69 by invoking section 811(c) and 811(d) of the Internal Revenue Code and to invoke the said provisions is in contravention to the Fifth and the Fourteenth Amendments to the Constitution of the United States of America.

Further, the petitioner contends The Tax Court erred in sustaining the objections made by counsel for the respondent when petitioner's counsel requested the admission into evidence of petitioner's Exhibits No. 16, Complaint for Divorce, Samuel Harrow, Plaintiff, v. Dell M. Harrow, Defendant, (R. 90, 91-94, 97, 99, 107, 110, 112) and No. 17, Commission to Take Deposition of Mary Mountain, Certificate, and Deposition of Mary Mountain (R. 95-97, 99, 107, 110, 111), objections noted (R. 94-96), as these Exhibits show clearly that the impelling cause for making the trust indenture of March 24, 1928, was to place trustor's property beyond the grasp of her then husband, Samuel Harrow; that the transfer was motivated by purposes associated with life, and cannot be deemed to have been made in contemplation of death. (See comments under Synopsis of Exhibits, Petitioner's Exhibits Nos. 16 and 17, this brief.) *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446, 9 A.F.T.R. 1440 @ 1445; *Becker v. St. Louis Trust Co.*, 296 U. S. 48, 56 S. Ct. 78, 16 A.F.T.R. 989 @ 991; *Colorado National Bank v. Commissioner*, 305 U. S. 23, 59 S. Ct. 48, 21 A.F.T.R. 965 @ 966.

At the time the trust was executed and became effective on March 24, 1928, the law applicable to the said trust was under section 302(c) of the Revenue Act of 1926. During the period from January 1, 1926, to June 2, 1932, there was no Federal gift tax in effect. The Joint Resolution of the Congress of March 3, 1931,<sup>a</sup> the amendment to section 302(c) of the Revenue Act of 1932, and subsequent amendments thereto are prospective in their operation and for that reason do not impose a tax in respect to past irrevocable transfers with reservation of a life interest.

Under the circumstances, this case definitely does not come within the rules laid down in the four cases, namely, *Commissioner v. Church, supra*, *Estate of West v. Commissioner, supra*, *Estate of Norma P. Durant v. Commissioner, supra*, and *Estate of Spiegel v. Commissioner, supra*, which were the basis of the decision of The Tax Court. In giving consideration to the facts and the law as brought out in this cause, it should be determined that the trust estate in the sum of \$188,302.40 is not subject to Federal estate tax and should not be included in the gross estate of the decedent, Dell Hinds Higgins, nor a deficiency determined of estate tax liability in the sum of \$29,009.69, or any other amount.

**CONCLUSION**

On the basis of the law and the facts, it is respectfully submitted that the findings and decision of The Tax Court of the United States should be reversed wherein it found a deficiency in estate tax of \$29,009.69, and judgment entered for the petitioner covering the estate tax claimed of \$29,009.69, and interest thereon in the sum of \$4,849.45, which has been paid to the Collector of Internal Revenue of the Sixth District of California in the total sum of \$33,859.14, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, together with interest thereon from and after the date of the payment thereof, to-wit; March 16, 1949.

Respectfully submitted,

GEORGE H. STONE

WM. D. MORRISON

*Counsel for Petitioner*

September 15, 1949.



No. 12,279

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**ESTATE OF DELL HINDS HIGGINS, DECEASED, SYDNEY M.  
HIGGINS, EXECUTOR, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

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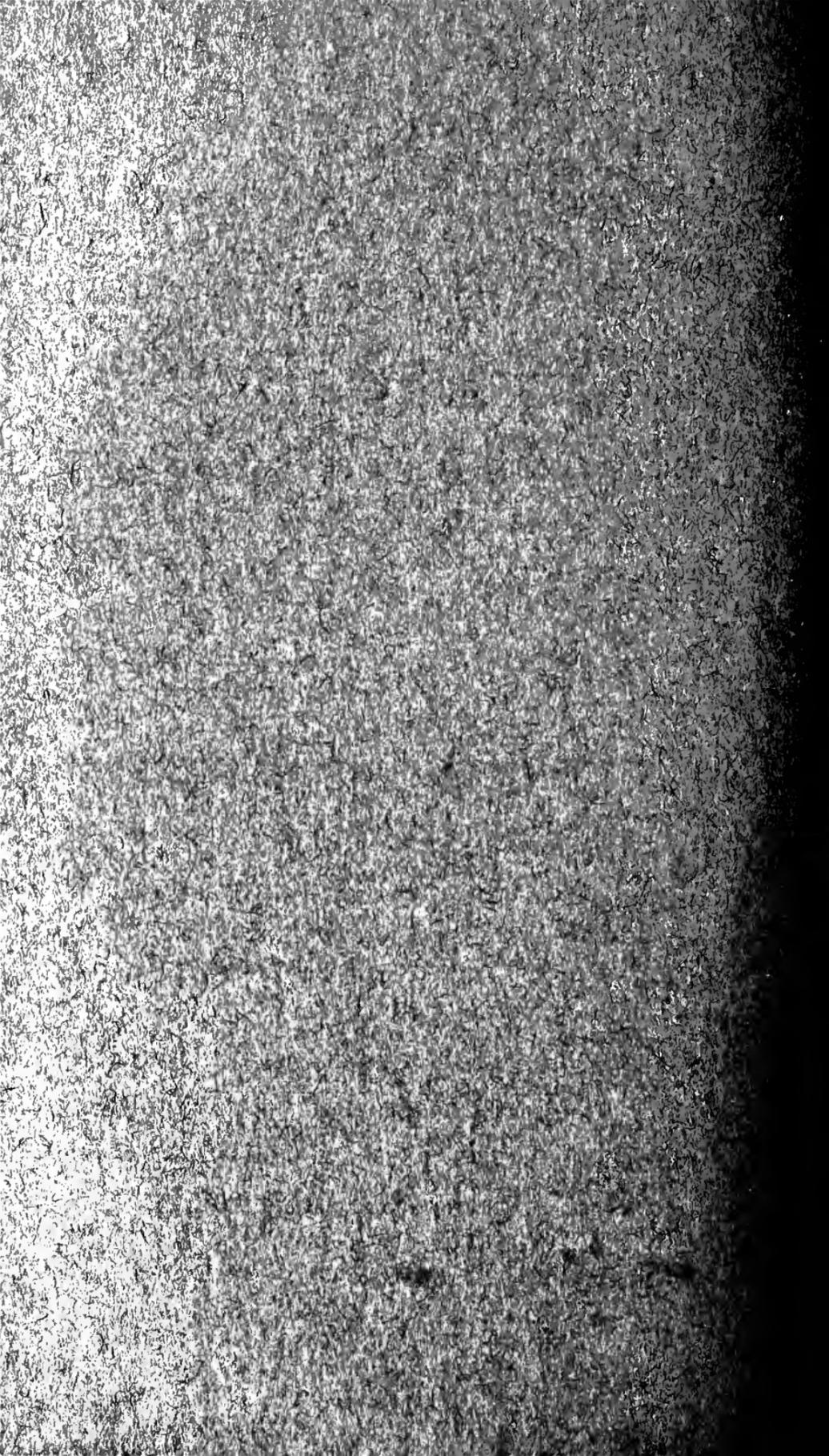
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**FILED**

OCT 18 1949

**PAUL P. O'BRIEN,**

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**In the United States Court of Appeals  
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ESTATE OF DELL HINDS HIGGINS, DECEASED, SYDNEY M.  
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*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

---

OPINION BELOW

The Tax Court entered memorandum findings of fact and opinion (R. 113-127) which are not reported.

JURISDICTION

This petition for review (R. 128-136) involves Federal estate taxes for the taxable year 1945. On March 20, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$29,009.69. (R. 9-12.) Within ninety days thereafter and on May 13, 1946, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 871(a) of the Internal Revenue Code. (R. 1.) On June 3, 1946, the

taxpayer filed an amended petition. (R. 3-21.) The decision of the Tax Court sustaining the deficiency was entered February 16, 1949. (R. 127.) The case is brought to this Court by a petition for review filed May 11, 1949 (R. 128-136), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

#### QUESTIONS PRESENTED

1. Whether the corpus of a trust created by the decedent in 1928 is taxable under Section 811 (e) of the Internal Revenue Code, as a transfer intended to take effect in possession or enjoyment at or after decedent's death, where the grantor reserved the right to have the trust corpus invaded for her comfort or well-being.

2. Whether the corpus of the 1928 trust is includible in the decedent's estate under Section 811 (d) (2) of the Internal Revenue Code.

3. Whether it is the entire value of the trust at the decedent's death or some lesser amount which is includible in the decedent's gross estate.

#### STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

#### STATEMENT

The facts found by the Tax Court (R. 113-126) which are pertinent to the issues before this Court are as follows:

The decedent taxpayer, Dell Hinds Higgins, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. The estate tax return, filed by the taxpayer, did not disclose a net estate. (R. 113.) Decedent's two children, Sydney and Helen, survived her. (R. 114.)

Decedent's first husband died in 1913, and she married her second husband, Harrow, in 1925. (R. 114.) After the marriage, Harrow constantly made demands upon the decedent for money, and, as a result, she became highly nervous. (R. 115.)

A few months before the present trust was created decedent went to a sanitarium near San Diego, California. She desired to get away from Harrow. (R. 115.)

On March 19, 1928, decedent's doctor called Sydney and requested him to come to the sanitarium. Harrow had been coming there frequently and disturbing decedent by making demands upon her for money, and on that morning Harrow had thrown a bunch of keys at decedent, hitting her in the face. Sydney went to his mother immediately. She was in a very nervous condition and seriously ill. (R. 115.)

On March 24, 1928, the decedent made a transfer under trust of most of her property. (R. 115-117.) Decedent expressed her intention to divest herself of all her property in such a manner that it would not be subject to the Federal estate tax. (R. 116.) Further, she felt that the establishment of this trust was the only way to free herself from the demands of Harrow and to prevent him from obtaining any part of her property. Five thousand dollars was paid to Harrow in connection with his divorce from the decedent. (R. 117.)

The Bank of Italy National Trust and Savings Association was named trustee of the trust. Its duties and powers as trustee included the following (R. 117-118):

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security

or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth.

\* \* \*

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

With respect to the current net income, the trust indenture provided as follows (R. 118-119):

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the trustor:

a. Seventy-five Dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five Dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

Sydney and Helen have each been receiving monthly payments as above provided. (R. 119.)

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. (R. 119.)

The trust is declared to be irrevocable. However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authorized to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee. (R. 119.)

Paragraph 7 of the trust indenture provides as follows (R. 119-120):

If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon

representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a. of paragraph 3, *supra*, with respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the court for invasion of corpus under paragraph 7, *supra*, would be required. (R. 120-121.)

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the court considered proper in the premises. On March 13, 1941, the court entered its decree changing subparagraph a. of paragraph 3 of the trust indenture to read as follows (R. 121):

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said

Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth.

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." On April 21, 1941, the court entered another decree again changing subparagraph a. of paragraph 3 of the trust indenture to read as follows (R. 122):

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a reasonably high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in: bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth.

On May 27, 1943, decedent petitioned the court for an order authorizing and directing the trustee to pay to

her the sum of \$300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of \$225 per month for the succeeding twelve months "is insufficient to adequately provide for her comfort and well-being, and that she has no other means of support or other income." No one appeared to oppose the granting of the relief prayed for and on June 11, 1943, the court entered its order authorizing and directing the trustee to make the payment of \$300 per month "paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be necessary to make such monthly payments until the further order of this Court." (R. 122-123.)

On October 25, 1943, decedent filed with the court a Petition for Order Allowing Additional Payment from Corpus of Trust. The petition stated in part that in previously petitioning the court for \$300 per month, a payment of \$75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only \$225 per month; furthermore, in the past sixty days, due to the pending liquidating of Hinds Estate, Incorporated, for salary of \$70 per month as vice president had been discontinued. In praying for an order authorizing and directing the trustee to pay her \$445 per month (\$300 plus \$75 plus \$70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows (R. 123):

That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before.

On November 19, 1943, decedent filed with the court an Amendment to Petition for Order Allowing Addi-

tional Payment from Corpus of Trust (R. 123-124) in which the prayer of her petition filed on October 25, 1943, was amended to read as follows (R. 124) :

Wherefore, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five (\$445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate.

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943. (R. 124.)

Pursuant to the court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts (R. 124) :

1943 (subsequent to June 11)....	\$ 624.06
1944 .....	1,175.17
1945 (prior to decedent's death on March 3).....	130.25

Total payments out of corpus.. \$1,929.48

All of the court proceedings detailed above were uncontested. Except for the original petition to alter or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. Neither of the chil-

dren ever requested an increase in their monthly payments of \$75 each from the trust; nor did they ever petition the court for payments out of corpus. No corpus was ever used for the benefit of either of the two children. (R. 124-125.)

For decedent's funeral expenses \$574.94 has been paid, and \$3,262.44 has been paid as the state inheritance tax. (R. 125.)

In his determination the Commissioner held (R. 9-12) that the value of the corpus created by the decedent in 1928 was includible in her gross estate, and accordingly he increased the estate by \$188,302.40, and as a result arrived at a deficiency in estate tax in the amount of \$29,009.69.

The Tax Court upheld the Commissioner's action in including the value of the corpus of the trust in the gross estate (R. 113-127), and accordingly sustained the deficiency (R. 127). The present review followed.

#### SUMMARY OF ARGUMENT

1. The decedent did not make a completed transfer during her lifetime. Only at her death did the rights of the two children-beneficiaries become consummate. There was an external standard, viz., comfort, well-being or education, which measured the right of the decedent to have the corpus invaded. Thus, she retained a "string" on the property, rendering it includible within her gross estate under Section 811 (c) of the Internal Revenue Code.

2. Similarly, since there was an external standard established, and since the contingency of invasion was no longer a contingency at her death—the trust indenture was changed twice and invasion was occurring—the trust property is includible within the grantor's gross estate under Section 811 (d) (2) of the Internal Revenue Code.

3. The full value of the trust property is includible within the grantor's gross estate. By exercising her "string" on the corpus, or by exercising her power to alter, amend or revoke, the decedent could conceivably have caused the entire trust property to revert to her. Hence, there is no basis for speculating upon the value of the property interest. The Tax Court correctly so held.

#### ARGUMENT

The Tax Court held, on the authority of *Commissioner v. Estate of Church*, 335 U. S. 651, that the portion of the trust from which decedent reserved the right to income for her life was includible in her estate. However, according to Section 81.17 of Treasury Regulations 105 (Appendix, *infra*), the *Church* case, *supra*, is inapplicable in a situation where the decedent died on or before January 17, 1949, and where the decedent's only right or interest in the property consisted of an estate for life. The Commissioner, therefore, in the interest of the fair administration of the federal tax laws, is not urging this issue in the instant case.

#### I

#### **The Decedent's 1928 Transfer in Trust Was Intended to Take Effect in Possession or Enjoyment at or After Her Death Within the Meaning of Section 811 (c) of the Internal Revenue Code**

Under the doctrine of *Estate of Spiegel v. Commissioner*, 335 U. S. 701, a transfer is intended to take effect at or after the decedent's death within the intendment of Section 811 (c) (Appendix, *infra*) if the provisions for distribution of the corpus are all made with reference to the grantor's death and if she retains some contingent interest in the trust corpus which makes it uncertain until at or after her death that the beneficiaries will receive the trust property. This has the effect of suspending the disposition of the trust corpus until

that time. *Helvering v. Hallock*, 309 U. S. 106; *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113. In other words, the decedent's death is the indispensable event which matures or enlarges the beneficiaries' interests or the decedent has retained some "string" on the trust corpus which delays until her death or thereafter "the ripening of full dominion over the property by the beneficiaries." *Fidelity Co. v. Rothensies*, *supra*, p. 112. The fact that the enjoyment or possession of the trust property by the remaindermen "is held in suspense until the moment of the grantor's death or thereafter" (*Fidelity Co. v. Rothensies*, *supra*, p. 111) and that the transfer is effectuated "finally and definitely at the decedent's death" (*Goldstone v. United States*, 325 U. S. 687, 692) requires the inclusion of the value of the trust property in a decedent's gross estate. *Commissioner v. Bank of California*, 155 F. 2d 1, certiorari denied, 329 U. S. 725.

The nature of the decedent's "string" or interest in the trust corpus is immaterial so long as it has the required effect of rendering the transfer inchoate. However, most of the decided cases involve the retention by the decedent of a possibility of reversion (see e. g., *Estate of Spiegel v. Commissioner*, *supra*; *Commissioner v. Estate of Field*, *supra*) or its equivalent, a contingent general power of appointment (*Fidelity Co. v. Rothensies*, *supra*).

The rule laid down by the Tax Court (R. 126) is that the required "string" or interest of the decedent may be supplied by the reservation of the right to have the trust corpus invaded for the grantor's benefit. The taxpayer does not argue to the contrary. (Br. 42, 46.) If the power to vest the property in the donor is governed by some external standard, enforceable in a court of equity, the trust is taxable under Section 811 (c). *Blunt v. Kelly*, 131 F. 2d 632 (C. A. 3d) (support, care

or benefit); *Chase Nat. Bank of City of New York v. Higgins*, 38 F. Supp. 858 (S. D. N. Y.) (needs of grantor); *Gallois v. Commissioner*, 4 T. C. 840, affirmed on another ground, 152 F. 2d 81 (C. A. 9th), certiorari denied, 327 U. S. 798 (misfortune and support); *Toeller's Estate v. Commissioner*, 165 F. 2d 665 (C. A. 7th) (misfortune or sickness); *Champlin v. Commissioner*, 6 T. C. 280 (comfort, maintenance, or benefit); *Estate of Rosenwasser v. Commissioner*, 5 T. C. 1043 (maintenance and comfort).

Therefore, as was stated in *Commissioner v. Irving Trust Co.*, 147 F. 2d 946, 949 (C. A. 2d):

In the case where a return of any part of the corpus to the settlor will depend solely upon the discretion of the trustee, the true test as to its inclusion in the taxable estate of the settlor is whether the trustee is free to exercise untrammelled discretion, or whether the exercise of his discretion is governed by some external standard which a court may apply in compelling compliance with the conditions of the trust instrument. If the former, the corpus is not subject to taxation as a part of the settlor's estate.<sup>1</sup>

The decedent by the trust instrument in this case authorized the corpus to be invaded for her comfort, well-being or education. (R. 120.) The taxpayer contends (Br. 43) that "Under such provisions no clear external standard was set \* \* \*." It is difficult to understand how the taxpayer can seriously urge this; it is clear that such a reservation by the decedent sets positive and external standards for the invasion of the corpus as to require the inclusion of the transfer in the decedent's gross estate. The decedent possessed

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<sup>1</sup> There was a further statement and qualification of the court's position in *Stix v. Commissioner*, 152 F. 2d 562, 563 (C. A. 2d): " \* \* \* no language, however strong, will entirely remove any power held in trust from the reach of a court of equity."

a power until the time of her death to revest the corpus in herself.

If this discretion had been exercisable by trustees, they would have been required to use reasonable judgment and to act in good faith. A court of equity could have compelled them to make payments to the decedent out of corpus if it were necessary in order to meet the standard established. See Restatement of the Law, Trusts, Sec. 187; 2 Scott, Trusts, Sec. 187; *Blunt v. Kelly*, *supra*.

The fact that the discretion in the instant case was given to a court instead of to trustees does not affect the result. If the trustees' decision as to invasion were subject to court review, then the question would be whether or not it was necessary for the comfort and well-being of the decedent. If the application were made directly to the court, as it was in this case, then the question would be precisely the same. Therefore, the only inquiry is as to the existence of an external standard.

The California decisions require the conclusion that the trust provision in the instant case constitutes an external standard. In *Estate of Smith*, 23 Cal. App. 2d 383, 386, a testamentary trust provided that the trustees should apply the income "so far as in their judgment they deem it necessary" to the support, maintenance, and education of the beneficiary. The court pointed out that the soundness of the trustees' discretion was reviewable. This result is to be compared with *Campbell v. Folsom*, 70 Cal. App. 2d 309, 312, where a trust instrument gave the trustees "absolute discretion." The court held that the soundness of the trustees' judgment was not reviewable; it could be attacked only for fraud or bad faith.

These cases are in accord with Section 2269 of the California Civil Code:

A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised unless an absolute discretion is clearly conferred by the declaration of trust.

At this juncture, it should be noted that the statement in *Commissioner v. Irving Trust Co.*, *supra*, relative to the test to be applied in this area, assumes the existence of a *discretionary* power. The test is whether the power is absolute, and thus untrammelled, or whether the exercise of the power is governed by some external standard.

The taxpayer points out (Br. 43) that in *Estate of West v. Commissioner*, 9 T. C. 736, affirmed *sub nom. St. Louis Union Trust Co. v. Commissioner*, 173 F. 2d 505 (C.A. 8th), the trustor was also a co-trustee. This fact is quite irrelevant. *Jennings v. Smith*, 161 F. 2d 74 (C.A. 2d).

In addition to the possibility of invasion of the principal for the decedent's comfort and well-being, the corpus was available and actually used for the payment of the decedent's funeral expenses and inheritance taxes. This is merely one more of the indicia denoting the incompleteness of the transfer and the fact that a "string" was retained by the decedent.

## II

### **The Corpus of the 1928 Trust Is Includible in the Decedent's Gross Estate under Section 811 (d) (2) of the Internal Revenue Code**

Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*) applies to transfers on or prior to June 22, 1936, and provides for the inclusion in the gross estate of property transferred by the decedent, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke. It is plain that the

instant case falls within the scope of these provisions as well as those of subdivision (c).<sup>2</sup> *Perrin v. Commissioner*, decided March 13, 1944 (1944 T. C. Memorandum Decisions, par. 44,076); cf. *Wenger v. Commissioner*, 127 F. 2d 523 (C. A. 6th), certiorari denied, 317 U. S. 646. And see also I Paul, Federal Estate and Gift Taxation (1942) and 1946 Supplement, Section 7.08.

Court approval was necessary in order to alter or amend, but it should be noted that in the court proceedings, the trustee was the defendant (R. 120) and that the decedent, in conjunction with either of her two children, had the sole right to select the attorney to represent the trustee (R. 15, 118). Moreover, the most effective way for the decedent to revoke, alter or amend the trust was to withdraw the corpus. She was in the process of doing this at the time of her death; the trust instrument was twice changed so that the corpus could be invaded for the benefit of the decedent. Distinguishable from this situation is *Jennings v. Smith*, 161 F. 2d 74, 78 (C. A. 2d), where the court deemed the important factor to be that the power to invade capital was based on "contingencies which had not happened." Here, the corpus was being invaded periodically; there was no contingency. It was possible for the decedent to recapture the entire corpus during her lifetime. Hence subdivision (d) applies. *Helvering v. City Bank Co.*, 296 U. S. 85; *Commissioner v. Estate of Holmes*, 326 U. S. 480; *Porter v. Commissioner*, 288 U. S. 436.

The taxpayer's further contention requires only brief notice. He argues (Br. 57) that the application of Sections 811 (c) and (d) of the Internal Revenue Code

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<sup>2</sup> This situation is to be compared with *Estate of Frew v. Commissioner*, 8 T. C. 1240, and *Industrial Trust Co. v. Commissioner*, 165 F. 2d 142 (C. A. 1st), where the corpus of the trust was not invadable for the benefit of the settlor but for other beneficiaries.

to the 1928 trust is in "contravention to the Fifth and Fourteenth Amendments to the Constitution." It is well settled that a taxing statute is not unconstitutional as to trusts created prior to its enactment. *Chase Nat. Bank v. United States*, 278 U. S. 327; *Reinecke v. Northern Trust Co.*, 278 U. S. 339. The relevant factor is that the "string" or the power exists at the determinative date, the decedent's death. There was not a complete transfer for estate tax purposes until 1945 when the contingencies were terminated. Further, the taxpayer's argument is addressed primarily to the provision relative to reserved life estates which as pointed out *supra*, is not being urged by the Commissioner.

### III

#### **The Entire Value at the Decedent's Death of the Trust Corpus Is Includible in the Gross Estate**

The entire value of the trust corpus is the amount includible in the decedent's gross estate. If taxability rests upon the provision of the trust instrument authorizing the trustor to apply to a court of competent jurisdiction in order to have the corpus invaded for her comfort or well-being—a provision which amounts to a possibility of reversion to the decedent—it is the value of the trust property which was subject to the decedent's possibility of reversion which is includible in the decedent's gross estate, not the value of the possibility of reversion. That point was squarely decided in *Estate of Spiegel v. Commissioner*, *supra*, where the Supreme Court stated (p. 707):

It is contended that since the monetary value of the settlor's contingent reversionary interest is small in comparison with the total value of the corpus, the possession or enjoyment provision of Section 811 (c) should not be applied. But inclusion of a trust corpus under that provision is not dependent upon the value of the reversionary interest \* \* \* The question is not how much is the

value of the reservation but whether after a trust transfer, considered by Congress to be a potentially dangerous tax evasion transaction, some present or contingent right or interest in the property still remains in the settlor so that full and complete title, possession or enjoyment does not absolutely pass to the beneficiaries until at or after the settlor's death.

This Court reached the same conclusion in *Gallois v. Commissioner*, 152 F. 2d 81, 83, certiorari denied, 327 U. S. 798:

\* \* \* the imminence or remoteness of the likelihood of the revesting contingency's occurrence is not a matter for our consideration.

The Tax Court was therefore correct in stating (R. 126):

And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner* \* \* \*.

The *Spiegel* case, *supra*, marks the culmination of the recent trend to sweep aside technicalities of property law and place emphasis on the test of whether there is a shift of economic interests at death. It follows, then, that with the trust principal payable to the decedent for such broad and unpredictable purposes, there is no basis for a computation which would result in a conclusion that some part of the trust principal was not subject to invasion for decedent's benefit. Cf. *Merchants Bank v. Commissioner*, 320 U. S. 256; *Henslee v. Union Planters Bank*, 335 U. S. 595. Inasmuch as the decedent reserved the right to have the corpus invaded if necessary for her comfort and well-being, and thus kept the entire fund available for her own purposes until she died, the entire corpus is clearly includible in

her gross estate. ~~Therefore, the entire value of the trust property is includible in the decedent's gross estate.~~

Similarly, if taxability rests upon the power to alter or amend, it is obvious that the entire value of the trust corpus at the date of death must likewise be the measure of the tax. *Commissioner v. Estate of Holmes*, 326 U. S. 480; *Du Charme's Estate v. Commissioner*, 164 F. 2d 959 (C. A. 6th). The entire corpus was subject to change through the exercise of the decedent's power to have the corpus invaded for her comfort and well-being.

#### IV

#### **In Any Event, the Decedent Made a Transfer in Contemplation of Death Within the Meaning of Section 811 (c) of the Internal Revenue Code**

There is still another point upon which the Commissioner relied to support the inclusion of the trust property in the grantor's gross estate and upon which the Tax Court found it unnecessary to pass in view of the disposition that it made of the case. The Commissioner found that the transfer under trust by the decedent in 1928 was in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code. (R. 9-12.) The definition of "contemplation of death" given in Treasury Regulations 105, Section 81.16 (Appendix, *infra*), is based largely on the comprehensive discussion in *United States v. Wells*, 283 U. S. 102. All attendant facts and circumstances are to be scrutinized to determine whether or not thoughts associated with death prompted the disposition. The inquiry, therefore, must be directed to the myriad of circumstantial factors attending each gift which may hold some clue as to what the decedent's motivation may have been. Each case must be decided in the light of its peculiar factual background. *City Bank Co. v. McGowan*, 323 U. S. 594; *Allen v. Trust Co. of Georgia*, 326 U. S. 630; *In re Kroger's Estate*, 145 F. 2d 901 (C.

A. 6th), certiorari denied, 324 U. S. 866; *Cronin's Estate v. Commissioner*, 164 F. 2d 561 (C. A. 6th). The decedent here was afraid that Harrow was going to cause her death in order to receive her property. The beneficiaries of the trust included the natural objects of her bounty. The transfer constituted almost the entirety of decedent's property. When her son—the executor of her estate—submitted the required sworn statement to the Bureau of Internal Revenue, he referred to the trust as a “will.” (R. 71.) The decedent provided for the payment of funeral expenses and inheritance taxes out of the trust corpus. See *Sloan's Estate v. Commissioner*, 168 F. 2d 470 (C. A. 2d). Hence, there would seem to be adequate basis for concluding that the transfer was in contemplation of death. Therefore, we suggest that the case be remanded to the Tax Court for consideration of this issue in the event that this Court should reverse.

The taxpayer urges (Br. 57) that the Tax Court erred in sustaining the objections to the admission into evidence of taxpayer's Exhibits 16 and 17 (R. 90-96, 110-111). It is plain that these rulings could not possibly be prejudicial to the taxpayer in that the evidence submitted was merely cumulative. Moreover, the proffered evidence related to an issue which the Tax Court did not pass upon, i. e., contemplation of death.

#### CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1949.

## Internal Revenue Code:

## SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \* \* \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust, or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

(d) *Revocable Transfers*—

\* \* \* \* \*

(2) *Transfers on or Prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power

in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

\* \* \* \* \*

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.16 [as amended by T. D. 5248, 1943 Cum. Bull. 1113]. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown

to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of \$5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264, and as further amended by T. D. 5741, 1949-20 Int. Rev. Bull.] *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

A right to the possession or enjoyment of, or a right to the income from, the property, or the right to designate the persons who shall possess or enjoy the property or the income therefrom, constitutes a right or interest in the property. (See also sections 81.18 and 81.19.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other

event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the next to the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

\* \* \* \* \*

In the case of a decedent who died on or before January 17, 1949, the date of the decision of the United States Supreme Court in *Commissioner v. Estate of Francois L. Church*, 335 U. S. 632, property transferred by the decedent shall not be included in his gross estate under this section if the decedent's only right or interest in the property consisted of an estate for his life. (See, however, sections 81.18 and 81.19.)

**In the  
United States  
Court of Appeals  
For the Ninth Circuit**

ESTATE OF DELL HINDS HIGGINS,  
DECEASED, SYDNEY M. HIG-  
GINS, EXECUTOR,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL  
REVENUE,

*Respondent.*

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.**

**REPLY BRIEF FOR THE PETITIONER**

FILED

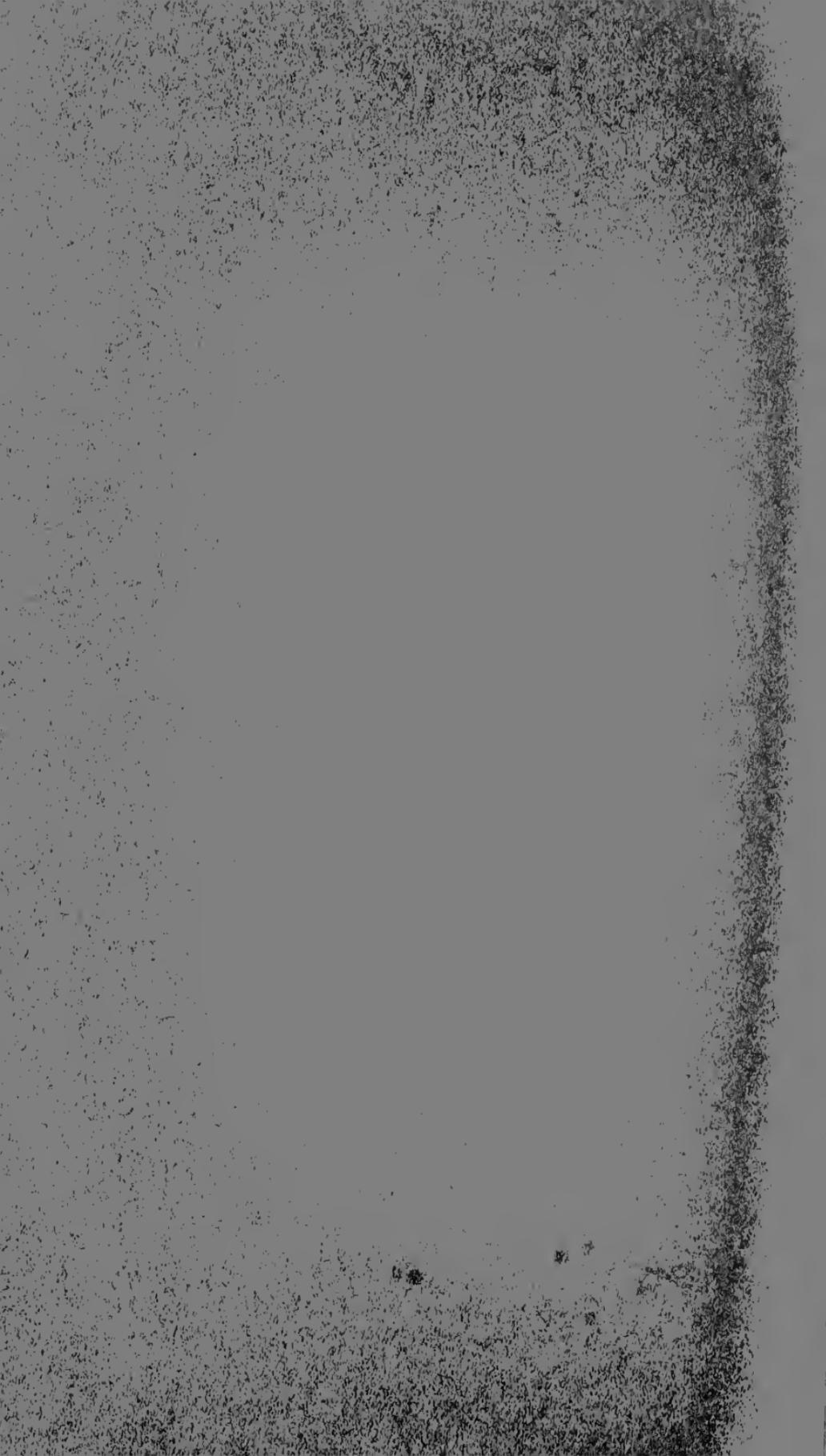
OCT 28 1949

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In the  
United States  
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ESTATE OF DELL HINDS HIGGINS,  
DECEASED, SYDNEY M. HIG-  
GINS, EXECUTOR,

*Petitioner;*

vs.

COMMISSIONER OF INTERNAL  
REVENUE,

*Respondent.*

No. 12279

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

REPLY BRIEF FOR THE PETITIONER

OPINION OF THE TAX COURT

The Memorandum Findings of Fact and Opinion of the United States (R. 113-127) are not officially reported.

JURISDICTION

The Jurisdiction remains the same as set out in Brief for the Petitioner, page 2.

## QUESTIONS PRESENTED

The questions presented are the same as set out in the Brief for the Petitioner, page 3.

## STATEMENT

The petitioner in this Reply Brief desires to call to the Court's attention the most noticeable errors and inconsistent statements, contained in the summary of an argument and argument presented in the Brief for the Respondent.

## SUMMARY OF ARGUMENT

Contrary to the Summary of Agreement of the Respondent, the entire Record supports the contention of the Petitioner:

1. (a) That the transfer of the property placed in hands of the Trustee by the decedent Trustor was completed on March 24, 1928, and that her two children, life beneficiaries, were entitled to and did receive income each month from the trust. In fact the Record shows a part of property placed in the trust was theirs. (R. 49, 116.) Trustor's death made no change in the title to the trust property, that was determined March 24, 1928 and has remained the same from that date to the present time. The only change which has taken place since the death of the trustor is that her two children now received all of the income from the trust whereas prior to her death, March

3, 1945, they each received \$75.00 a month. No transfer or conveyance of property could have been more final and complete, and out of the hands of the grantor than the property which on March 24, 1928, passed from the donor to the trustee under the provisions of the trust indenture which was irrevocable. (Resp. Br. 10.)

1. (b) That the words "comfort, well-being or education" could not have measured an external standard for the reason a Court of competent jurisdiction alone had the power to determine whether any corpus of the trust property could be used for the purpose stated. Neither the beneficiaries nor the trustee had any power or enforceable right, to determine what constituted the necessity for "comfort, well-being, or education" out of the Corpus of the trust. (Resp. Br. 10.)

1. (c) That the decedent retained no "string" whatsoever upon the trust property as the trust indenture of March 24, 1928, was irrevocable, therefore the value of the trust property is definitely not includable in the gross estate under Section 811 (c) of the Internal Revenue Code which petitioner contends is not applicable. (Resp. Br. 10.)

2. Again Petitioner must insist that there was no external standard established as no invasion of the trust property could be made by decedent or the trustee, therefore, the trust property is not includable within the grantor's gross estate under Section 811, (d) (2)

of the Internal Revenue Code which again petitioner contends is not applicable. (Resp. Br. 10.)

3. It is indeed difficult to understand why the respondent contends that the full value of the trust property is includable in the grantor's gross estate when she had no "string" upon the corpus of the trust what-so-ever and that neither she nor the trustee could invade it and the trust indenture was definitely made irrevocable therefore there was not the remotest possibility of a reversion of the trust property to the decedent. (Resp. Br. 11.)

### ARGUMENT

In the first paragraph of the respondent's argument he now very graciously admits that the case, *Commissioner v. Estate of Church*, 335 U. S. 651, is not applicable to the cause now before this Court and states "The Commissioner, therefore, in the interest of the fair administration of the federal tax laws, is not urging this issue in the instant case." (Resp. Br. 11.) The petitioner's position is that neither *Church case*, *supra*, nor the case of *Estate of Spiegel v. Commissioner*, 335 U. S. 701, is applicable to the instant case as there was no possibility of reverter to the trustor and these two cases were the basis of the decision of the Tax Court of the United States and particularly the *Church case*, *supra*. The *Spiegel case*, *supra*, appears to be cited merely for good measure and because it involved Section 811 of the Internal Revenue Code.

Petitioner is definitely of the opinion that the *Spiegel case, supra*, has no more bearing on the issues at bar than did the *Church case, supra*. Further, if The Congress has enacted H. R. 5268, into the law, although we have not yet been advised, we believe the question will be fully answered and that the trust property will not be includable in the decedent's gross estate without other authority. This question is discussed and supported by authorities, in petitioner's opening brief, that the trust estate is not includable in the gross estate of the decedent. In support of taxpayers contention the following is quoted from The Tax Barometer and Alexander Tax News, Vol. 6. No-45, October 8, 1949:

“Pending Legislation, Paragraph 672, Estate Tax Amendments. The latest news on the status of the Senate's estate tax amendments to H. R. 5268 (Bar., V. 6, Para. 564) is that the House and Senate conferees have worked out the following agreement:

Transfers made prior to June 7, 1932, presently taxable solely because of the reservation of life interests, are exempt in the case of donors dying before January 1, 1950. No refunds will be granted where barred by the statute of limitations. Donors living on and after January 1, 1950 may surrender their life estates during 1950, free of both gift and estate tax.

Transfers made before October 3, 1949, will not be taxed merely because the donor has a possibility of reverter by operation of law or an expressly reserved

reverter worth less than 5% of the value of the property. The amendment applies to decedents dying after February 11, 1939 and refunds may be obtained despite expiration of the statute of limitations. Transfers made after October 3, 1949 will be taxed if the donees cannot obtain possession or enjoyment of the property except by surviving the donor, regardless of whether the donor retains an interest in the property.”

## I.

### THE DECEDENT'S 1928 TRANSFER IN TRUST WAS INTENDED TO TAKE EFFECT IN POSSESSION AND ENJOYMENT AT THE TIME THE TRUST WAS CREATED AND NOT AT THE TIME OF HER DEATH AS RESPONDENT CONTENDS.

Respondent cites *Estate of Spiegel v. Commissioner*, 335 U. S. 701, decided January 17, 1949, as authority for including the trust property of this decedent in her gross estate but completely overlooks the case of *Hassett V. Welch (1938)*, 303 U. S. 303, which held with reference to Sec. 302 (c) of the 1926 Revenue Act, (now Sec. 811 (c) of the Internal Revenue Code) and it had no retroactive effect and it was applicable only to transfers made on or after May 3, 1931. (Resp. Br. 11).

In citing *Helvring v. Hallock*, 309 U. S. 106; *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113; *Goldstone v. United*

*States*, 325 U. S. 687, 692; *Commissioner v. Bank of California*, 155 F. 2d 1, certiorari denied, 329 U. S. 725; *Estate of Spiegel v. Commissioner*, *supra*; respondent argues that the decedent's death is the indispensable event which matures or enlarges the beneficiaries' interest or the decedent has retained some "string" on the corpus which delays until her death or thereafter all of which is without merit for the reason the Trust Indenture of March 24, 1928 at the time of its creation fully, and completely determines the position of the beneficiaries as the said instrument was irrevocable without possibility of reversion. (Resp. Br. 12.)

The statement of the respondent as to the rule laid down by the Tax Court, "is that the required "string" or interest of the decedent may be supplied by the reservation of the right to have the trust corpus invaded for the grantor's benefit," is indeed inconsistent with the language used by the said Court and further to say the taxpayer does not argue to the contrary (Pet. Br. 42, 46.) is certainly not correct (See Petitioners Br. 42, 46.) The decedent had no power to invade the corpus of the trust and definitely retained no "string" upon it. (Resp. Br. 12, 13.) Respondent cites the following cases in support of his contention: *Blunt v. Kelly*, 131 F. 2d 632 (C. A. 3d) *Chase National Bank of City of New York v. Higgins*, 38 F. Supp. 858 (S. D. N. Y.), *Gallois v. Commissioner*, 4 T. C. 840, affirmed on another ground, 152 F. 2d 81 (C. A. 9th), certiorari denied, 327 U. S. 798, *Toeller's Estate v.*

*Commissioner*, 165 F. 2d 665 (C. A. 7th) *Champlin v. Commissioner*, 6 T. C. 280, *Estate of Rosenwasser v. Commissioner*, 5 T. C. 1043, *Commissioner v. Irving Trust Co.*, 147 F. 2d 946, 949 (C. A. 2d); but utterly fails to state that all of these cases are based on the premise that either the trustee or the trustor or possibly both had the untrammelled power of invasion, whereas in the instant cause no particular person, persons, or corporate entity, possesses that power. If the respondent would give the usual and ordinary meaning to the language used in the Trust Indenture he should readily understand why taxpayer urges that there is no clear external standard set. Also to state "The decedent possessed a power until the time of her death to revest the corpus in herself" is certainly not obtained from the provision of the Trust Indenture. (Resp. Br. 13, 14.)

The reasoning of the respondent wherein he states "The fact that the discretion in the instant case was given to a court instead of to trustee does not affect the result" is materially defective as the trustee or trustees are usually direct representatives of the trustor who has an enforceable right against the trustee if an external standard is provided, whereas in the instant case neither the trustee nor the trustor has any right of invasion whatsoever and the Court is untrammelled in its discretion. (Resp. Br. 14.)

The statement of the respondent which reads: "The California decisions require the conclusion that the trust provision in the instant case constitutes an ex-

ternal standard," is more erroneous as the decisions referred to are the *Estate of Smith*, 23 Cal. App 2d, 383, 386, wherein the Court pointed out that the soundness of the trustees discretion was reviewable and in the other case cited, *Campbell v. Folsom*, 70 Cal. App. 2d, 309, 312, wherein the Court held the soundness of the trustee's judgment was not reviewable, and as to Section 2269 of the California Civil Code, it is for the purpose only of defining or clarifying the powers of a trustee, and has no application so far as the instant case is concerned. Our trustee has no discretion, no standard set up and therefore, no right to invade the corpus for trustor or beneficiaries.

The effort of the respondent in the numerous cases cited in an attempt to build up his argument and urge that there was an external standard set, no doubt grew out of the fact that not one case exists where the matter rested in the untrammelled discretion of a court of competent jurisdiction. The cases cited by respondent are not in any way analagous to the proceeding now before this Court, and Counsel for Respondent cites no case. Counsel for the petitioner are frank to admit that they have been unable to locate such a case.

## II.

**THE CORPUS OF THE 1928 TRUST IS DEFINITELY NOT INCLUDABLE IN THE DECEDENT'S GROSS ESTATE UNDER SECTION 811 (d) (2), AS THAT SECTION IS NOT APPLICABLE TO THE INSTANT CASE.**

Respondent's contention that Section 811 (d) (2) of the Internal Revenue Code is applicable and provides for the inclusion in the gross estate of property transferred by the decedent where the enjoyment thereof was subject at the date of her death to any change through the exercise of a power, either by the decedent alone, or in conjunction with any person, to alter, amend, or revoke, is not well founded for the reason no such condition exists in the provisions contained in the Trust Indenture.

It took far more than merely the court's approval to make a withdrawal from the corpus of the trust, it took the sound discretion of a court of competent jurisdiction and then only upon a showing of the necessity for the withdrawal. By adding the total withdrawals of \$1,929.48, to the corpus inventory of \$188,302.40, at the date of decedent's death, the trust property, had there been no withdrawal, would have totaled \$190,231.88, or withdrawals of 1.014277% of the total trust property for the period 1943, 1944 and 1945 to the date of decedent's death, a very negligible amount. Which indicates the extent to which the respondent is attempting to "make a mountain out of a molehill", when he

states, "the most effective way for the decedent to revoke, alter, or amend the trust was to withdraw the corpus." "She was in the process of doing this at the time of her death;" (Resp. Br. 16). The small amounts withdrawn were not by reason of any right reserved by the trustor or granted to the trustee. Respondent states "The trust instrument was twice changed so that the corpus could be invaded for the benefit of the decedent." (Resp. Br. 16.) That statement is not true. The two changes of the trust agreement by the Court were solely to make possible increase of income to the trust and thereby to avoid any application to the Court for relief.

Petitioner has never argued as stated in Brief for Respondent, pages 16 and 17, that Sections 811 (c) and (d) of the Internal Revenue Code is unconstitutional, but petitioner does take the position that the said subsections are not applicable to the trust property involved in this proceeding as the trust was created, was effective, and title to the property passed without a "string" attached thereto in any way, on March 24, 1928, and to apply a section of the code subsequently passed without being made retroactive would certainly be in contravention of the Fifth and Fourteenth Amendments to the Constitution and to support petitioner's position that the said Section as passed was not retroactive, we respectfully refer to Brief for Petitioner, pages 49, 50, 51, 52, 53. Respondent repeatedly attempts to fix the date as the year 1945, as he appears to fully realize that his argument is without merit if

he applies the law to the proper date, namely, March 24, 1928.

### III.

#### **THE VALUE AT THE DECEDENT'S DEATH OF THE TRUST CORPUS IS NOT INCLUDABLE IN THE GROSS ESTATE.**

The statement by respondent wherein he used the following words, certainly conveys a different meaning than is supported by the trust indenture: "If taxability rests upon the provision of the trust instrument authorizing the trustor to apply to a court of competent jurisdiction in order to have the corpus invaded for her comfort or well-being — a provision which amounts to a possibility of reversion to the decedent—it is the value of the trust property which was subject to the decedent's possibility of reversion which is includible in the decedent's gross estate, not the value of the possibility of reversion." (Resp. Br. 17.) whereas the provisions under the trust indenture read as follows: "If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent neces-

sary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts." (Paragraph 7, Trust Indenture). It is submitted that there are no provisions in said instrument which would amount to a reversion of the trust property to the decedent grantor. As there is no question of the value of a reversionary interest it is difficult to understand why respondent continually insists upon the case, *Spiegel v. Commissioner*, *Supra* as authority to support his contention.

As for the respondent's statement which reads: "The Tax Court was therefore correct in stating (R. 126): And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner* . . ." petitioner contends that the Tax Court was no more correct in citing the *Spiegel case, supra*, than it was in citing the *Church case, supra*, since at the time it decided instant case it used the *Church case* as paramount authority for its opinion and decision. Respondent now concedes the *Church case, supra*, is not applicable to the case now before the Court.

The trust indenture did not contain any power to alter or amend as contended by the respondent (Resp. Br. 19). The said instrument speaks for itself. (Joint Exhibit 2-B).

## IV.

**THE DECEDENT DID NOT MAKE A TRANSFER  
IN CONTEMPLATION OF DEATH AS CON-  
TENDED BY THE RESPONDENT BUT ON  
THE CONTRARY MADE THE TRANSFER  
FOR MOTIVES ASSOCIATED WITH LIFE.**

The point upon which the Commissioner relied to support the inclusion of the trust property in the grantor's gross estate and upon which the Tax Court found it unnecessary to pass upon was very evident by reason of the fact that the trustor was in good health, although in an upset condition, at the time the trust was created in 1928, and lived seventeen years thereafter, and made the trust solely to prevent her husband from obtaining the property; so the creation of the trust could not have been in contemplation of death and to sustain respondent's contention cites *United States v. Wells*, 283 U. S. 102, 9 A. F. T. R. 1440 @ 1444. (Resp. Br. 19.) Petitioner desires to call attention to the substance of the rule laid down in the *Wells case, supra*, as set out in *Saunders et al v. Higgins*, 23 A. F. T. R. 701 @ 703, which reads as follows: "(6) In determining whether a transfer was made 'in contemplation of death' within the meaning of the estate tax laws, the test is always to be found in the motive of the decedent. If 'the thought of death' is the impelling cause of the transfer, then the statute applies; but if the transfer is motivated by purposes associated with life, then it can not be deemed made in

contemplation of death. *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; *Becker v. St. Louis Trust Co.*, 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35; *Colorado National Bank v. Commissioner*, 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20; *Farmers Loan & Trust Co. v. Bowers*, 2 Cir., 98 F. 2d 794, certiorari denied, 306 U. S. 648, 59 S. Ct. 589, 83 L. Ed. 1047.”

Respondent’s statement “The decedent here was afraid that Harrow was going to cause her death in order to receive her property.” (Resp. Br. 20) is without foundation as she could have made a will whereby Harrow would not have received any part of her property, or without a will under that part of Section 221—California Probate Code, which reads “221. Surviving spouse, issue. If the decedent leaves a surviving spouse, and only one child or the lawful issue of a deceased child, the estate goes one-half to the surviving spouse and one-half to the child or issue. If the decedent leaves a surviving spouse, and more than one child living or one child living and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are the same degree of kindred to the decedent they share equally, otherwise they take by right of representation.” In respondent’s argument he completely overlooks the fact that Harrow in the ab-

sence of a Will would, under the Code, only receive one-third of decedent's property and under a Will so worded none of her property. The object of making the trust indenture was to place decedent's property beyond the talons of her then husband and decedent's property was transferred March 24, 1928, by Trust Indenture motivated by purposes associated with life and therefore the value of the trust property is not includable in the gross estate of the decedent.

### CONCLUSION

On the basis of the law and the facts, it is respectfully submitted that the findings and decision of The Tax Court of the United States should be reversed wherein it found a deficiency in estate tax of \$29,009.69, and judgment should be entered for the petitioner covering the estate tax claimed of \$29,009.69, and interest thereon in the sum of \$4,849.45, which has been paid to the Collector of Internal Revenue of the Sixth District of California in the total sum of \$33,859.14, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, together with interest thereon from and after the date of the payment thereof, to-wit; March 16, 1949.

Respectfully submitted,

GEORGE H. STONE

WM. D. MORRISON

*Counsel for Petitioner.*

October 24, 1949.

No. 12280

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JOHN NELSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

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No. 12280

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN NELSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

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### I.

#### Statement of Basis of Jurisdiction.

Appeal from judgment rendered against Appellant Nelson by the United States District Court, for the Southern District of California, Central Division, upon a plea of guilty by said Appellant Nelson of violating Section 338 of Title 18, U. S. Code (1946 Ed.) (commonly known as the Mail Fraud Statute) as charged in Counts One and Two of the Indictment in this cause of action. [Indictment R. 2-5; Plea R. 11.] The Appellant was sentenced to a term of imprisonment of five years on each of Counts One and Two, said sentences of imprisonment to run consecutively and not concurrently, making a total period of imprisonment of ten years. Appellant was further sentenced to pay a fine of \$1,000 on each of said Counts One and Two, or a total fine of \$2,000, and to stand committed until said fine is paid. [Judgment R. 14-16.] Counts Three, Four, Five and Six of said Indictment

were dismissed on Motion of the United States Attorney. [Judgment R. 14-16.]

Thereafter, the Appellant duly filed Motion to reduce and correct sentence imposed. [R. 17-19.] Said Motion was duly considered by The Honorable Wm. C. Mathes, United States District Judge, and upon Findings of Fact and Conclusions of Law, an Order was duly entered by said Honorable Court denying the Motion of Appellant for reduction and correction of said sentence.

Thereafter, Appellant duly filed his Notice of Appeal from the judgment against him, within the time prescribed by law.

Thereafter, the record in this case was filed with the Clerk of this Honorable Court.

## II.

### Statement of the Case.

The record will show that on December 31, 1947, Appellant pleaded guilty to Counts One and Two of a six count Indictment charging violations of Title 18, Section 338, U. S. Code (1946 Ed.), and not guilty to Counts Three, Four, Five and Six, charging similar violations. [Plea R. 11.] Counts Three, Four, Five and Six were dismissed on April 14, 1947, on Motion of the Government. [Judgment R. 15.]

Counts One and Two of the Indictment, to which Appellant pleaded guilty, and to which judgment was entered against him, charge, in substance, that Appellant “. . . devised a scheme to defraud . . .” persons referred to in said Indictment, and “. . . to obtain money and property by means of false and fraudulent representations and promises contained in advertisements which he caused to be published in” newspapers named in said Indictment,

“well knowing at the time that the pretenses, representations and promises would be false when made.” [Indictment R. 1-5.]

Count One further charges that “On or about December 10, 1946, at Los Angeles, Los Angeles County, California, . . .” Appellant “for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Joel Nikolauson, 108 Canal Drive, Turlock, California.” [Indictment R. 1-3.]

Count Two further charges that “On or about November 18, 1946, at Los Angeles, Los Angeles County, California,” Appellant “for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Costa Mesa Globe Herald, Costa Mesa, California.” [Indictment R. 4-5.]

### III.

#### **Argument.**

There is but one question presented on this record for consideration by this Honorable Court, namely, whether the substantive counts constitute separate offenses or one single offense.

Appellee contends that each count constitutes a separate offense, and that the maximum penalty provided by the Statute can be imposed upon each separate Count.

In this connection, the record will show that Count One and Count Two charge that for the purpose of executing the aforesaid scheme and artifice to defraud, letters were deposited at two different times, to-wit, the mailing of the letter in Count One occurred on December 10, 1946, and the mailing of the letter in Count Two occurred on

November 18, 1946. On this point the law is well settled that the statute denounces as separate crimes each separate deposit of a letter in the mail for the unlawful purpose.

The law, apparently, is conclusive to the effect that each separate use of the mail, in execution of a continuing fraudulent scheme, constitutes a punishable offense.

*Mitchell v. U. S.* (C. C. A., N. M., 1944), 142 F. 2d 480, cert. den. 65 S. Ct. 49, 323 U. S. 747, 89 L. Ed. 598;

*Weatherby v. U. S.* (C. C. A., Okla., 1945), 150 F. 2d 465.

The gist of the offense under this section denouncing use of the mails to promote fraud is the mailing of a letter in the execution of scheme to defraud, and mailing and letter itself constitute the *corpus delicti*, and each letter deposited in or removed from the post office in furtherance of a fraudulent scheme is a separate violation of this section.

*Bozel v. U. S.* (C. C. A., Ohio, 1943), 139 F. 2d 153, cert. den. 64 S. Ct. 937, 321 U. S. 800, 88 L. Ed. 1570, rehearing denied 64 S. Ct. 1054, 322 U. S. 768, 88 L. Ed. 1596.

Under this section making use of mails in connection with a scheme to defraud an offense, a single scheme to defraud may involve a multiplicity of ways and means of action and procedure, and it may be that the complete execution of a single scheme will involve commission of more than one criminal offense.

*U. S. v. MacAlpine* (C. C. A., Ill., 1942), 129 F. 2d 737;

*Mansfield v. U. S.* (C. C. A., Tex., 1946), 155 F. 2d 952.

Several letters mailed in pursuance of a scheme to defraud constitute separate offenses under this section.

*Becker v. U. S.* (C. C. A., Cal., 1937), 91 F. 2d 550.

The mailing of each letter containing forged supply orders whereby relief funds were misappropriated was a distinct substantive offense under this section.

*Stumbo v. U. S.* (C. C. A., Ky., 1937), 90 F. 2d 828, cert. den. 58 S. Ct. 282, 302 U. S. 755, 82 L. Ed. 584.

Each mailing constitutes separate violation of this section.

*Spirou v. U. S.* (C. C. A., N. Y., 1928), 24 F. 2d 796, cert. den. 48 S. Ct. 559, 277 U. S. 596, 72 L. Ed. 1006.

While the practice of treating two letters relating to the same fraud as separate offenses is not approved, conviction on such a charge, resulting in two maximum sentences, cannot be set aside.

*U. S. v. Steinberg* (C. C. A., N. Y., 1932), 62 F. 2d 77, cert. den. 53 S. Ct. 526, 289 U. S. 729, 77 L. Ed. 1478.

Each individual act of taking a letter or package from a post office or putting a letter or package in a post office, in furtherance of a scheme to defraud, constitutes separate and distinct offenses, and each violation may be separately punished.

*U. S. ex rel. Bernstein v. Hill* (C. C. A., Pa., 1934), 71 F. 2d 159.

IV.

**Conclusion.**

It is respectfully submitted that Count One and Count Two of the Indictment charge separate offenses against the laws of the United States; that the Appellant was not sentenced twice for a single offense, and that the Motion to correct an illegal sentence was properly denied, it being shown that the sentence imposed by the Trial Court was not an illegal sentence.

Respectfully submitted,

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